CONFEDERATION SYNDICAT EUROPEAN TRADE UNION

COMPETITION AND LABOUR

A Trade Union Reading of EU Competition Policies

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EXECUTIVE SUMMARY

Competition practices are facing a growing range of criticisms amid concerns that corporate power is at an all-time high. This raises a number of challenges, including adverse impact on sustainability issues and the widening of income inequalities.

As far as the employment dimension is concerned, this report will raise questions about the apparent unwillingness of EU competition authorities to address the asymmetry of power between capital and labour.

Workers' challenges under current competition policies

DOMINANCE IN THE LABOUR MARKET

The principle

Competition policies are tolerant of market dominance when it is perceived as creating benefits for consumers in the form of cheaper, more diverse and higher-quality goods or services. The European Commission in its capacity as EU competition enforcer will only intervene to curb dominance where certain behaviours may further restrict competition and harm consumers. This intervention may take two forms:

1. Control of mergers and acquisitions

In the vast majority of cases, large mergers or acquisitions are cleared with targeted remedies to address identified risks of reduced competition. This is because competition authorities often consider that there is a justification for the planned concentration that overcomes potentially anticompetitive effects.

2. In the case of a dominant position, certain behaviours may be considered abusive

Abuse of dominant position may for instance consist in imposing unfair trading conditions (e.g. unfair purchase or selling price), limiting production to the prejudice of consumers, discriminatory behaviours, or making the acceptance of contracts subject to the acceptance of supplementary obligations.

A series of high-profile cases for abuse of dominant position have been issued in the digital sector (e.g. cases against Microsoft and Google).

The employment dimension

The assessment of dominance is almost exclusively governed by the consumer welfare standard, i.e. looking at impact on price and consumer choice. However, whilst a planned concentration or an abuse of dominant position may on the surface have a beneficial impact for consumers, it may also generate adverse effects on sustainability, including environmental as well as social aspects.

Specifically on employment, increased corporate concentration impacts workers at several levels:

- In a situation of labour-market monopsony, an employer has the power to set wages unilaterally and is able to degrade working conditions without losing its workforce.

Increasing corporate concentration is a strong driver of labour-market monopsonies. Further, a common factor to all types of labour-market monopsonies is where employers' power is not compensated by sufficient bargaining power on the side of the workers.

The risk of creating labour-market monopsonies is not assessed by competition authorities, which solely focus on efficiency gains and the consumer interest. Yet, the impact of increased labour-market concentration on employment and job quality is real.

- Unfair labour practices. A dominant player may be able to impose employment conditions that seek to tie the workforce to the company and thus to further strengthen employers' power over individual workers. Increasing corporate concentration directly feeds into a wider reliance on unfair labour clauses.

Such practices include for instance "wage fixing" or "non-poaching" agreements, whereby firms agree not to compete or "poach" workers from each other. Competition authorities are increasingly willing to scrutinise these as part of anti-cartel investigations.

- A merger or an acquisition often generates significant impact on employment levels and substantial changes in production processes or work organisation.

In some Member States, such as France or Germany, competition authorities may apply a general interest test for operations that fall within the scope of national law. This general interest test covers in particular the need to maintain employment. This, however, does not concern operations with a European dimension. EU merger controls focus narrowly on efficiency theories and consumer welfare and leave little room for the promotion of social dialogue and safeguarding of employment.

CARTELS AND SUSTAINABILITY AGREEMENTS

The principle

Concerted actions between economic actors which would normally compete with each other are traditionally seen by competition authorities as most harmful to consumers. EU antitrust enforcement evidences a long list of prohibited agreements with hefty fines. Cartels are a recurrent issue that competition authorities appear to have difficulty eradicating in spite of high financial sanctions. The overall increase of corporate concentration is a likely driver for the persistence of such illicit agreements.

In the context of the EU Green Deal, the Commission may be relaxing antitrust rules for sustainability agreements. The objective is to soften the rules on the basis of substantial economic and sustainability benefits, as long as the consumer also gets a fair share of those benefits.

The employment dimension

- The risk of collective bargaining agreements being targeted by antitrust enforcement

In a 2014 ruling (C-413/13 of 4.12.2014), the Court of Justice held that self-employed workers must in principle be regarded as undertakings for the purposes of competition law and that a trade union negotiating on their behalf might therefore become subject to antitrust rules.

The EU Commission published Guidelines in September 2022 clarifying that trade unions cannot be considered illegal cartels under EU law, regardless of whether they act on behalf of e.g. platform workers or the genuinely self-employed.

These Guidelines will have an authoritative effect. As soft law, however, they are not legally binding on the EU Court of Justice nor on national competition enforcers.

- The employment impact of "sustainability agreements"

Including sustainability objectives in the application of antitrust rules could constitute a first step towards the broadening of the consumer welfare standard. The risk, however, is that, in the absence of appropriate monitoring, profit-seeking businesses will primarily look at strengthening market power, using their contribution to sustainable investment as a means to an end. Furthermore, the Commission does not assess the impact of such agreements on employment. This is a missed opportunity for Just Transition principles, according to which workers' rights and livelihoods must be secured when shifting towards sustainable production. Finally, there is a risk that sustainability agreements are used by companies as a way to circumvent collective bargaining with trade unions.

STATE AID TO COMPANIES IN FINANCIAL DIFFICULTY

The principle

Whilst state aid is as a general principle prohibited, there are substantial exemptions. It is indeed accepted that public interventions might be necessary to offset market failures. As a consequence of this substantial body of exemptions, the volume of state aid in the EU is considerable. In 2020, the total expenditure for COVID-19 measures amounted to EUR 227.97 billion, covering around 59% of total state aid spending. For non-COVID-19 measures, the EU 27 and the United Kingdom spent EUR 156.36 billion on state aid in 2020.

The Commission **has a more prudential policy when it comes to supporting individual companies in difficulty**, which it considers the most distortive type of state aid. The EU Commission therefore applies an efficiency test to assess whether public support is objectively justified and to ensure that state intervention does not last longer than necessary.

The employment dimension

- The safeguarding of quality jobs does not appear among the conditions that may be imposed by the EU Commission to clear state aid to companies in financial difficulty.
- The impact on employment of planned state aid is not assessed by the EU Commission.
- Poor enforcement of EU labour rules is not considered illegal state aid.

STATE AID AND PUBLIC SERVICES

The principle

One of the principles of EU competition law is that an undistorted market is not only of fundamental importance to the achievement of the internal market – removing barriers to trade – but is also generally perceived as fulfilling a "social function": less-efficient entities in terms of productivity, pricing and innovation are driven out.

At the same time, the EU Treaties recognise that a certain amount of state intervention may be required to protect entities fulfilling public service missions.

Non-economic services of general interest, such as the police, justice and statutory social security schemes, are as a matter of principle exempt from EU competition law due to their non-economic nature.

Services of general economic interest ("SGEI") are in principle covered by state aid rules due to their economic nature. However, some derogations are possible to the extent that this is necessary to the fulfilment of the public service objectives they pursue.

Public control, in the form of state ownership and/or exclusive or special rights, is assessed very restrictively and on the basis of economic tests. With regard to public subsidies, the complexity of the state aid rules has proved cumbersome for local authorities. With regard to the financing of public service obligations, the Commission intervenes to control whether any over-compensation has been paid to companies.

The sustainability dimension

The challenges raised by the outsourcing of public services include **job losses and adverse impact on the universality and quality of essential services, with a disproportionate effect on those living in poverty and on a lower income.**

Further challenges are raised by the EU liberalisation of certain sectors, brought to the forefront by the pandemic, the cost of living and the energy crises.

Recommendations

OPPORTUNITIES UNDER EXISTING FRAMEWORKS

A first recommendation is for trade unions to increase their influence over competition outcomes through a more regular use of interested-party interventions in the course of merger control, antitrust and state aid proceedings.

- With regard to merger control, trade unions could more systematically request that competition authorities anticipate the employment impact of a planned concentration.

A first step should be to ascertain whether workers have been informed and consulted about the decision leading to the merger or acquisition, and whether they will be involved in any future restructuring plan. This is an essential step to mitigate the adverse impact on jobs usually entailedin large mergers.

Second, the efficiency test currently applied by the Commission to assess the competition impact of a planned concentration should be enlarged to assess any risk of an excessively imbalanced relation between the prospective employer and the workforce.

Faced with the risk of labour-market monopsony, behavioural remedies should be imposed so as to address the power asymmetry. Such remedies must include union-friendly policies, collective bargaining coverage and the presence of instances for workers' representation. And just like a merger can be refused in the case of excessive supplier power, it should also be possible to stop mergers when a labour-market monopsony which cannot be addressed by structural and behavioural remedies is arising around the corner.

Third, workers' representatives and trade unions should seek consultation on the remedies that are often imposed by the EU Commission during merger-control procedures.

- Trade unions could document the harm to workers as a result of unfair labour practices (e.g. no poaching, non-compete, algorithm marking the worker).

Recent Commission declarations lead us to believe that trade unions could successfully adopt an offensive strategy for such unfair labour practices through the lodging of formal complaints. Precedents can already be found in national law, for instance in the Netherlands and Portugal.

- With regard to state aid, trade unions could intervene as interested parties to demand social conditionality.

Firms that rely on public support designed to maintain employment should be required to demonstrate they have maintained workforce levels, wages and benefits. To this end, appropriate monitoring mechanisms, including through dialogue with worker-representation instances, can be considered as a useful tool.

Trade unions could also intervene to demand that other financial assistance, in particular as part of industrial policies, contain social conditionalities to secure just transitions. Mostly, social conditionality would require that state aid recipients engage in collective bargaining with a view to anticipating changes and to putting in place appropriate supporting measures in the transition to new jobs (e.g. reskilling, options for retirement, remuneration).

TOWARDS A REFORM OF EU COMPETITION PRINCIPLES

Whilst the current legal framework offers procedural opportunities for an increased trade union engagement in competition assessments, it may appear in the longer run that EU competition authorities lack the tools to take a more proactive and affirmative approach towards workers' rights.

Introducing a **public interest test into competition law would increase the capacity of competition authorities to capture the reality of economic power,** having regard not just for products and services but also ownership of capital, firms' ability to charge prices exceeding marginal cost of production and/or to obtain extraordinary profits – the so-called "economic rents".

From there, stricter competition assessments should be expected with prohibitions and remedies seeking to achieve broader sustainability goals.

Countries outside Europe (e.g.: South Africa, the US) have introduced or are currently exploring public interest tests as part of their competition policies.

With regard to public services, we recommend starting a detailed assessment of the impact of EU competition principles on the sustainable financing of services of general economic interest in the light of the pandemic and the current energy and cost of living crisis. These deep crises have indeed brought to the forefront the role of public services to foster resilience, address inequalities and secure quality jobs. They have also highlighted the endemic problem of public underfunding in certain essential sectors and thus may call into question the current economic model.

Depending on the conclusions of this assessment, trade unions may consider resuming demands for a European framework reaffirming the superior importance of public services over free-market principles.

INTRODUCTION

The origins of European competition law go back to 1950, when the Treaty of Rome introduced strong provisions on that subject. Competition enforcement has grown and strengthened considerably since then, but the goals of competition policies have remained the same: avoiding unfair competition between Member States and companies, market efficiency and consumer benefits for goods and services traded on open markets.

The European Commission and the Court of Justice of the European Union form the EU competition authorities. The European Commission is the primary enforcement body for EU competition law. As this report will describe, the European Commission enjoys extensive powers. It can oblige Member States to suspend and reimburse state aid, prohibit a merger, insist on remedial actions (including breaking up a company) or take action against cartels by imposing heavy fines. Within the Commission, the Directorate-General for Competition (hereafter "DG COMP") is primarily responsible for these enforcement powers.

The Court of Justice of the European Union can hear appeals against Commission decisions and applications from national courts for the interpretation of EU principles. National competition authorities enforce national law in cases that do not have an EU dimension, i.e. where they do not affect trade between Member States. National policies, however, must not contain principles contrary to EU law.

Today, the achievements of competition policies are coming under intense scrutiny. There is an increasing understanding that competition enforcement has an impact not only on consumers but also on society, on public policies and the way economies and markets are shaped. Competition experts have long been of the opinion that social and political objectives broader than consumer interests are best achieved through other public policy tools, such as labour law, environmental regulation and taxation. It now appears that competition policies may in the foreseeable future go through significant changes. Digital, green and social transformations call for a holistic policy response, including from the perspective of competition policies. In response to deep and multiple economic disturbances, competition authorities have also had to suspend their normal functioning to allow for greater state interventions into domestic economies. In parallel, studies increasingly document the worrying impact of large corporate power.

With the exception of public-sector unions which have a history of active engagement in state aid rules and liberalisation policies, the labour movement has invested relatively few resources in competition policies. One reason might be the sheer complexity of the applicable rules and the feeling that competition enforcement is a technocratic bubble, dominated by law firms and difficult to penetrate for trade unionists. Further, EU competition policies are not formally considered social policies within the meaning of Art. 153 and 154 TFEU. As a result, and because of a narrow interpretation of these provisions, the EU Commission does not have a history of consulting social partners on the possible direction of Union action in this field.

In this context, the European Trade Union Confederation (hereafter 'ETUC') launched a two-year research project seeking to apply a trade union lens to competition issues. This project pursues a double objective:

- To provide an analysis of the interplay between EU competition policies and workers' rights;
- To raise awareness and issue recommendations for a trade union agenda for more socially responsible competition policies[1].

1 This study focuses on EU competition law as laid down in Art. 101-109 TFEU and related articles. Other instruments such as the public procurement framework or various liberalisation Directives fall outside the scope of this study but may be mentioned in connection to competition-law principles.

A training event targeting trade union lawyers took place on 28-29 June 2022 to raise awareness of fundamental concepts of competition law and their relevance for workers and labour markets.

Preliminary findings of the research were discussed during the NETLEX Conference on 15-16 November 2022. A final workshop took place on 7-8 December 2022 to take stock of the research and discuss policy and legal recommendations. All inputs have been integrated into this final study.

The key message of this report is that competition policies have a significant impact on employment levels, wages and working conditions. Adverse consequences may arise whenever a narrow assessment of the consumer interest and strict economic efficiency tests are insufficiently balanced with social and environmental considerations. In addition, state aid without social conditionality does not always serve workers' interests. As a result, trade unions may consider putting in place a strategy to intervene more proactively in enforcement proceedings regarding mergers, antitrust and state aid. In the longer term, policy advocacy for a reform of competition sources might also be necessary.

Title I outlines the goals and challenges of EU competition policies. Titles II to V review the rules applicable to cartels, merger control, abuse of dominant position and state aid. Each of these titles contain an overall description of the principles as well as a specific analysis of the employment dimension. The final Title VI lays down recommendations for more socially responsible competition policies under the current EU legal framework with a view to developing more long-term oriented trade union demands for future reforms of EU competition policies.

TITLE I.
Goals and challenges of EU competition policies

KEY MESSAGES

The protection of consumer welfare does not appear as such among the objectives listed in the Treaty on the European Union, which instead refers to the establishment of a "highly competitive social market economy". Competition practices are facing a growing range of criticisms amid concerns that corporate power is at an all-time high. This raises a number of challenges, including the widening of income inequalities.

Evaluations of current policies should be carried out both in relation to the narrow focus on consumer interests and with regard to their distributional and societal effects.

1. Market-oriented goals

Whilst the objectives of competition law vary from one legal tradition to another, the "consumer welfare" standard will often be part of these objectives. 'Consumer welfare' is a term used in economics and competition law to describe the benefits that an individual derives from the consumption of goods or services[2]. In competition applications, the goal is to maximise consumers' surplus, i.e. when the price that consumers pay for a product is less than the price they are willing to pay.

Numerous statements tend to indicate that a key objective of EU policies is the enhancement of consumer welfare. For instance, the EU Commission's website reads: *Competition policy encourages companies to offer consumers goods and services on the most favourable terms. It encourages efficiency and innovation and reduces prices. To be effective, competition requires companies to act independently of each other, and subject to the pressure exerted by their competitors.*

Arguably, the pursuit of consumer welfare is an economic model consolidated in soft law and secondary legislation but not one that was made ever clear in the EU Treaties. The Treaties make no express mention of consumer welfare, insisting instead on the notion of open markets with a social purpose. Art. 3 of the Treaty on the European Union ("TEU") sets the objectives of the Union, including *a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment*. Art. 119.1 of the Treaty on the Functioning of the European Union ("TFEU") specifies that the economic policy of the EU and Member States has to be conducted in accordance with the principle of an open market economy with free competition. As we will repeatedly describe in this report, a competitive environment free from distortions and restrictions is a fundamental element of the internal market, considered to improve productivity and growth.

Whilst a market-oriented philosophy is clearly evident in the Treaties, it is also important to note that free competition is not considered an end in itself. Article 3.3 TEU establishes the principle that the EU is a highly competitive **social** market economy. The word "social" was added by the Lisbon Treaty in 2008 to respond to concerns that the EU was driving too much towards a market economy direction, where economic decisions are determined by market forces only. A Protocol 26 was also attached to the Treaties, emphasising the importance of services of general interest for Member States. Title IV of this report elaborates on the understanding of the EU as a mixed economy, where public interventions are considered necessary to offset market failures. In the same vein, Title V reviews how the Treaties recognise the importance of services of general interest in the shared values of the Union.

2 OECD Glossary of Statistical Terms – Consumer welfare definition

2. Does competition deliver fairer markets?

2.1 SUCCESSES

It is often argued that competition policies have a social dimension. Better and cheaper products and services are beneficial for individual consumers, in particular those at lower income levels, thereby raising their living standard. From this perspective, evaluation studies usually find that EU competition policies are effective in eliminating anti-competitive pricing (Ilzkovitz, 2020). Furthermore, a 2020 study indicates that EU Commission interventions in merger control and cartel prohibitions over the period 2012-2018 may lead to a 0.3% increase in GDP and a 0.2% increase in employment in the medium term. The overall price reduction associated with these decisions can reach 0.4% (Ilzkovitz et al., 2020).

The findings of ex post evaluations do vary depending on the parameters chosen for the methodology. With regard to employment levels, quantitative data only do not provide information on the quality of the new jobs created. With regard to price, possible variations over a long-term period are not assessed. Importantly, competition outcomes are increasingly assessed not just in relation to consumer price but also their distributional and societal effects. From this broader perspective, the achievements of competition policies are coming under increasing scrutiny.

2.2 CHALLENGES

Competition practices are facing a growing range of criticisms amid concerns that corporate power is at an all-time high. There are several ways to measure increasing corporate power.

Industry concentration refers to the weight of the largest firms within an industry. The OECD has documented such concentration in Europe as well as in North America (Figure 1). Another indicator of increasing corporate power is the increase in markups, i.e. the ability of a firm to charge excessive price, well above the cost of production. Markups have been consistently increasing in the last two decades. A third measurement is the size of extraordinary profits, the so-called "economic rents".Here again, the indicator is pointing at an increase (Figure 2).

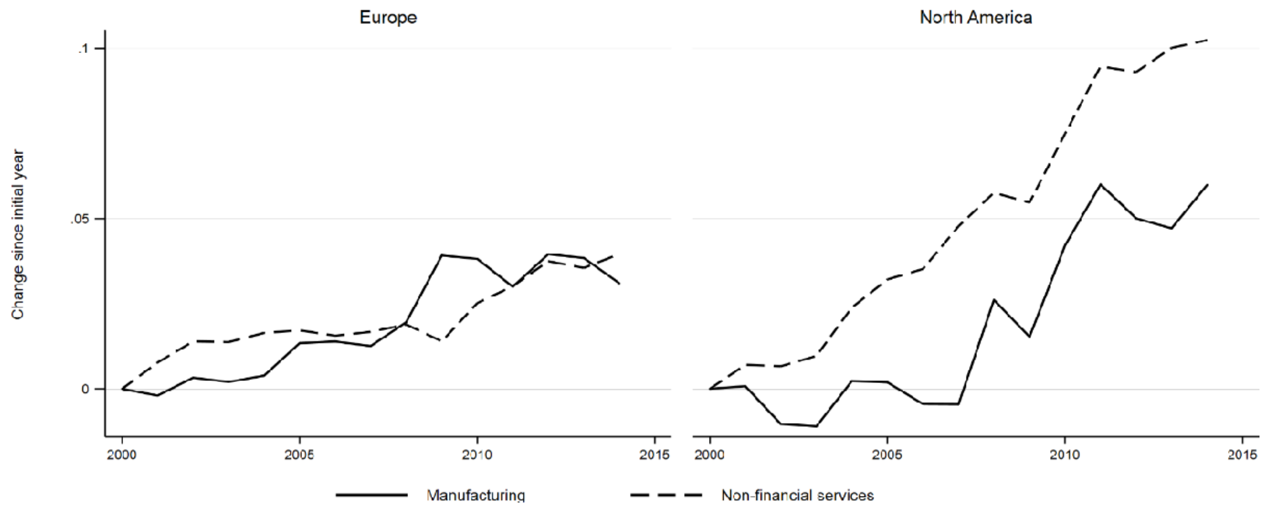
All measurements clearly point towards an increase of corporate power across all sectors of the economy, with multinational enterprises becoming fewer and larger. Title III will review key drivers for this trend, including a narrow understanding from EU competition authorities of what might constitute corporate power, the state of competition on global markets with the emergence of worldwide champions and of course the winner-takes-all effect in the digital sector. Other factors outside the scope of this report, such as patent protection and trade secrets, may also play an active role in shielding corporations from risks of competition.

In parallel, workers' ability to bargain for a higher share of corporate profits has been steadily decreasing throughout the OECD (Figure 3).

This increasing asymmetry between corporate and labour power has a direct impact on income distribution. In recent years, profits have increased faster than wages, in spite of serious economic disturbance which would normally mark a drop in corporate profitability (Source: (OECD Stats, 2016) Figure 4).

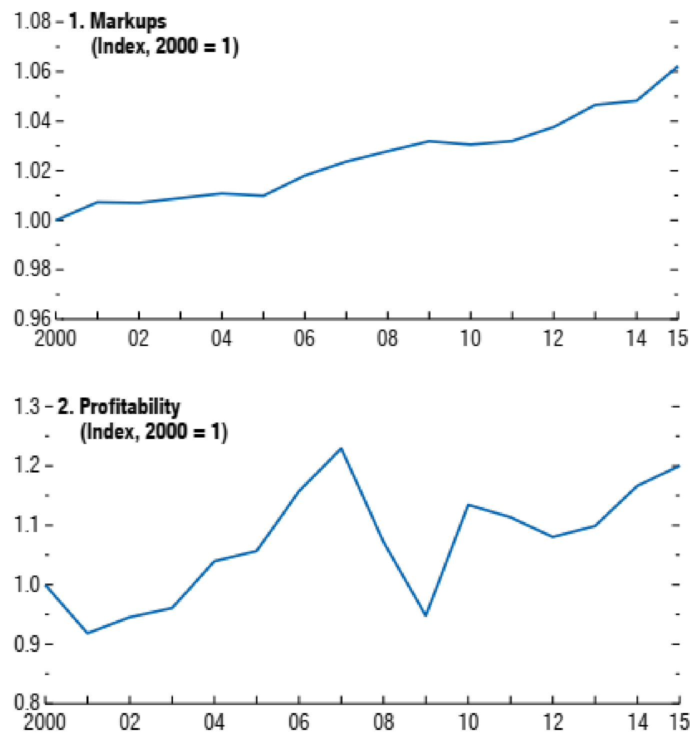
In simpler terms, the rich are getting richer. This is feeding into an increasing gap between labour and capital income shares. Figure 5 shows the share of national income going to labour in OECD countries in 2001 and in 2016. Almost everywhere, labour has been losing out, which directly feeds into income inequalities.

Figure 1 Concentration for manufacturing and services in Europe and North America



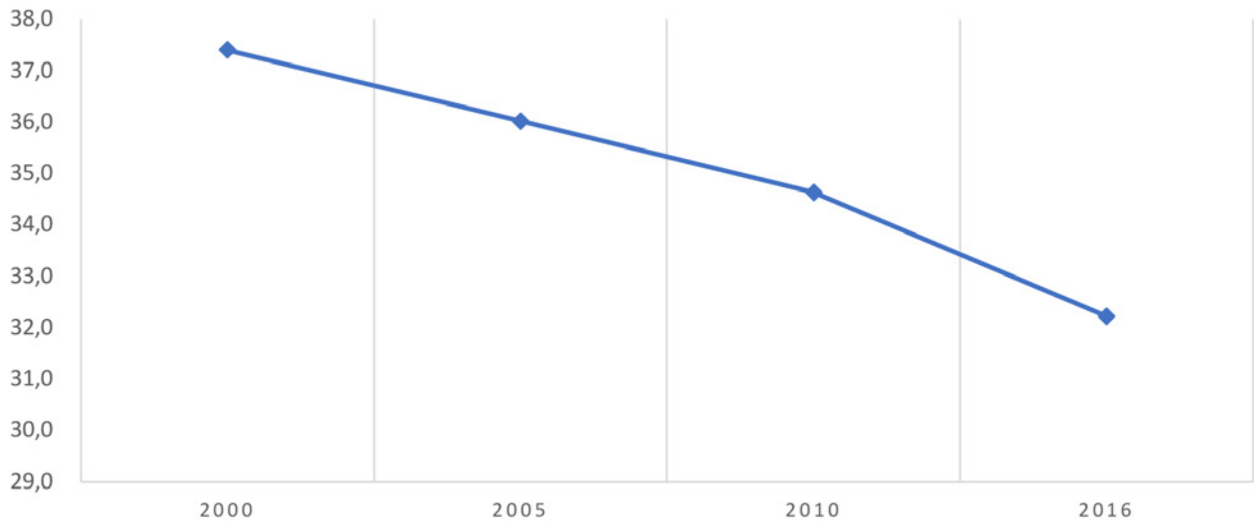
Source: (Bajgar et al, 2019)

Figure 2 Global increase in corporate power – markups and profitability indicators in 2019



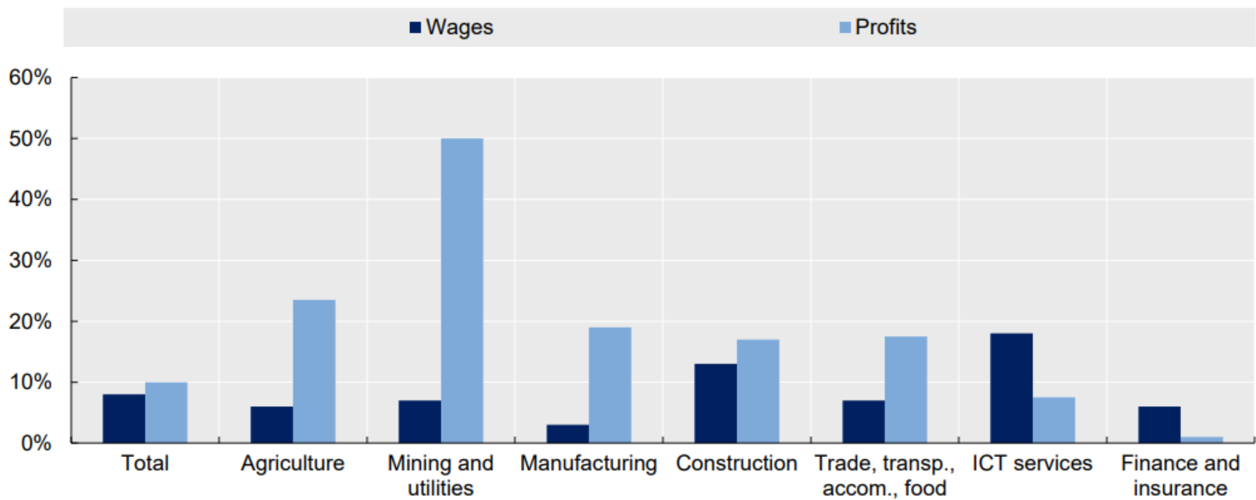
Source: (IMF, 2019)

Figure 3 Annual percentage of employees with the right to bargain in the OECD



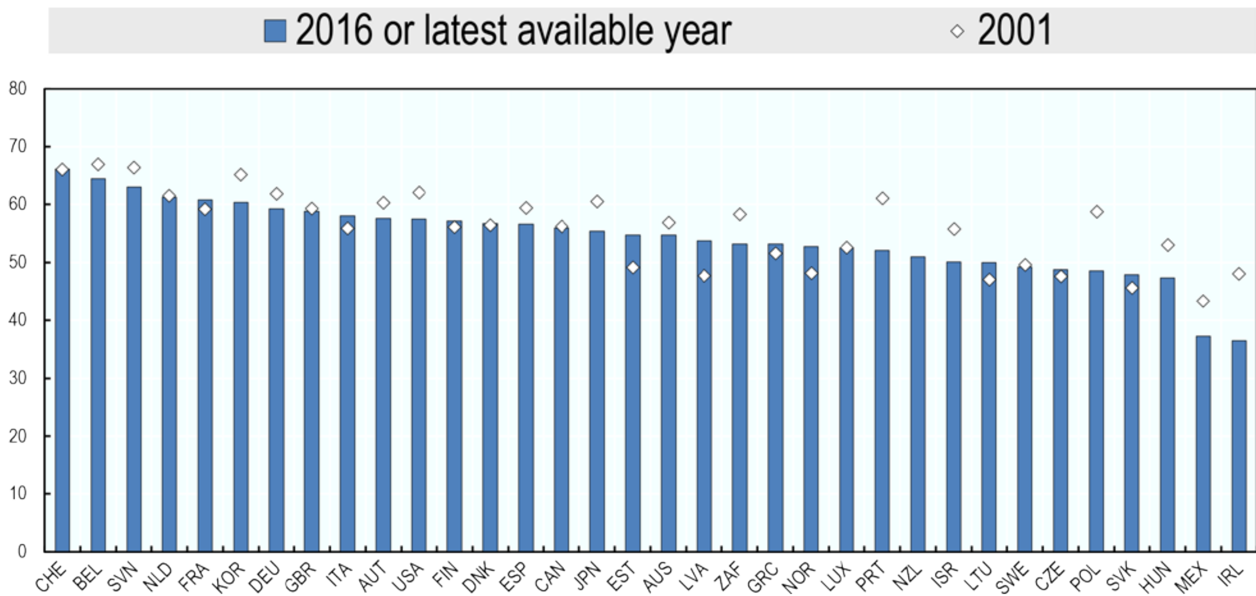
Source: (OECD Stats, 2016)

Figure 4 Growth in nominal wages and corporate profits in the Euro area, changes from Q1-2019 to Q2-2022



Source: (Bassanini (2022), presentation to an ETUC workshop)

Figure 5 Labour income share in the total economy



Source: (OECD Stats, 2018)

2.3 OUTLOOK

It is often argued that competition policies pursue a social goal through the protection of individual households' economic interests. In light of the above, however, the ability of current competition practices to tame corporate power and to protect the vulnerable must be questioned. Strong economic power also means increased influence over political power with the ability of private interests to impact on democracy, pluralism and data protection. These concerns are particularly strong in the digital sector[3].

As far as the employment dimension is concerned, this report will raise questions about the apparent unwillingness of EU competition authorities to address the asymmetry of power between capital and labour. Further, rigid merger control may have led to job losses and downward pressure on working conditions. Questions must also be asked about whether state aid control pays sufficient attention to dynamic industrial policies which take the form of subsidies and can contribute to quality employment. As far as public services are concerned, the impact of a market-oriented approach raises serious questions with regard to the general interest and its impact on human rights and labour conditions.

3 See the analysis of the Balanced Economy Project

TITLE II.
Cartels, collective bargaining and sustainability agreements

KEY MESSAGES

This Title reviews the objective of cartel investigations and the role played by the EU Commission.

In spite of financial sanctions that are among the highest in the world, cartel practices in the EU appear to be on the rise. One driver could be increased corporate concentration, with large corporations enjoying a feeling of impunity.

Treating collective agreements on behalf of self-employed workers as potentially anticompetitive practice is a threat to trade union work. The issue has been addressed through the adoption of Commission Guidelines, granting a de facto immunity from competition-law enforcement.

Exemptions to anti-cartel prohibition also include the relaxing of antitrust rules in favour of sustainability agreements between competitors. There is currently an absence of Just Transition principles in the assessment of the permissibility of such agreements. Questions should also be raised as to the understanding of sustainability in relation to a narrow interpretation of the consumer welfare standard.

1. The principle of Art. 101 TFEU – a prohibition of principle

EU competition law as a principle makes it illegal for businesses to act together as part of a concerted action rather than competing with each other. It is indeed considered that agreements between companies remove competition pressure, which in turn may lead to increases in price, reduced output and less innovation. Effective competition therefore requires companies to act independently of each other and to be subject to competition pressure.

Thus, Art. 101 TFEU prohibits agreements, decisions or concerted practices between two or more market operators which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition.

An agreement or concerted practice between competitors operating in the same market is usually referred to as "horizontal agreement". Prohibited behaviours can also arise between suppliers and distributors. These are "vertical agreements".

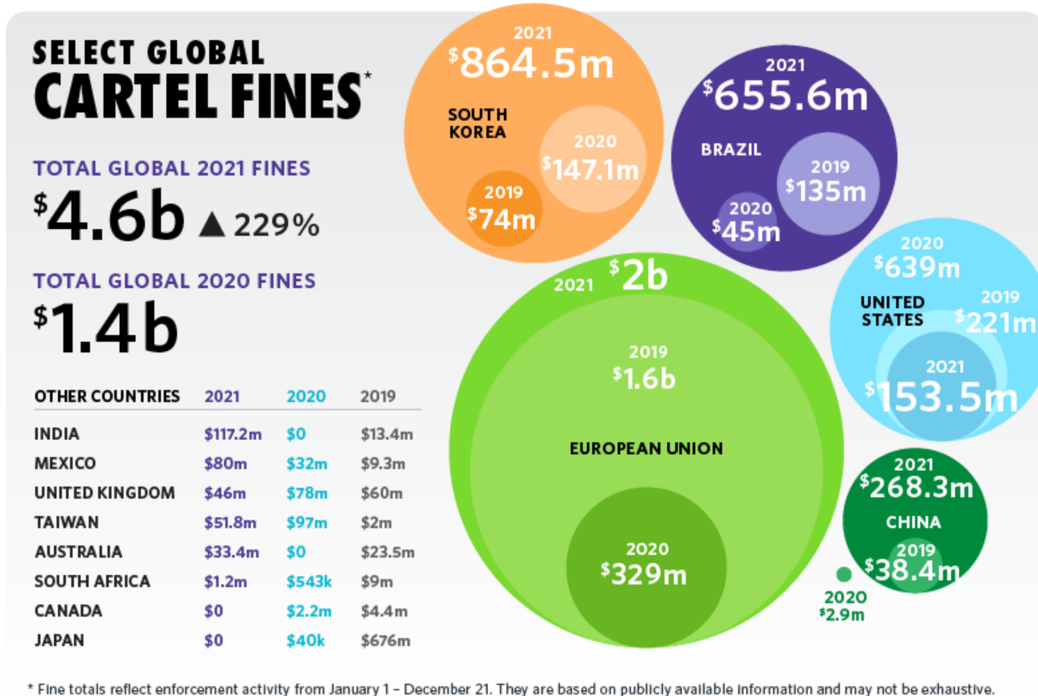
Horizontal agreements, and in particular cartels, are considered the most harmful to consumers. Cartels usually entail competitors joining together to fix prices, limit production and share markets or customers between one another.

Vertical agreements seek to restrict competition between one of the parties and a third company. Such practices usually entail exclusivity conventions between suppliers and distributors. A market is then artificially isolated from competition, leading to higher prices for consumers.

In spite of financial sanctions that are among the highest in the world (Figure 6), cartel practices in the EU do not appear to be diminishing. Between December 2019 and January 2022, the European Commission has investigated over 40 suspicions of antitrust and cartels. Manufacturing, including car parts, is the sector most exposed to fines, followed by finance and basic industry (Figure 7). These figures encompass investigations for both cartels and abuses of dominant position.

One explanation of this trend is that the Commission is investing more resources in cartel investigations, leading to more visible results. This is probably not the only explanation. Increased corporate concentration is also a driver for anti-competitive practices, with large corporations enjoying a feeling of impunity more and more.

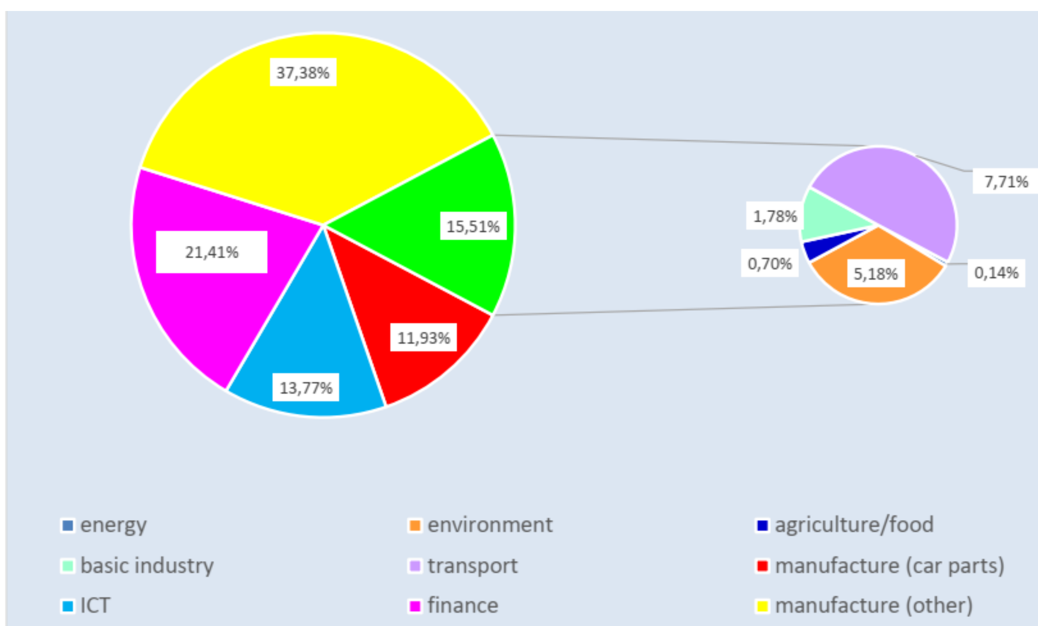
Figure 6 Global cartel fines (2021)



OTHER COUNTRIES	2021	2020	2019
INDIA	$117.2m	$0	$13.4m
MEXICO	$80m	$32m	$9.3m
UNITED KINGDOM	$46m	$78m	$60m
TAIWAN	$51.8m	$97m	$2m
AUSTRALIA	$33.4m	$0	$23.5m
SOUTH AFRICA	$1.2m	$543k	$9m
CANADA	$0	$2.2m	$4.4m
JAPAN	$0	$40k	$676m

Source: (Morgan Lewis, 2021)

Figure 7 Fines imposed per sector since 2010

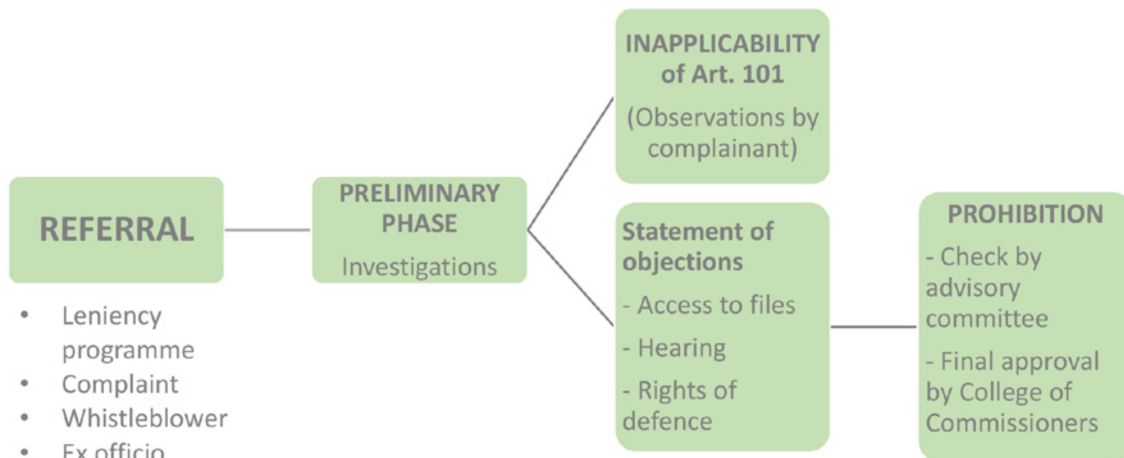


Source: (European Commission, 2021)

2. Overview of Art. 101 procedure

The Commission's powers to enforce Art. 101 are detailed in the antitrust Regulation 1/2003[4]. This section provides an overview of the applicable procedure, from the triggering of an investigation to the final approval by the College of Commissioners.

Figure 8 Overview of Art. 101 investigations



2.1 EU- AND NATIONAL-LEVEL COMPETENCES

The European Commission's competence is triggered when trade between Member States is potentially affected by an agreement or concerted practice. This would be the case for instance if agreement in one Member State concerns products or services coming from another Member State.

Impact on trade must be sensible. According to Commission guidelines, agreements affecting less than 5% of market shares and below EUR 40 million turnover do not in principle appreciably affect trade between Member States (European Commission Notice, 27.04.2004).

National competition authorities are competent to investigate national and localised behaviours. If an agreement potentially affects the entire territory of a Member State, the European Commission may also consider itself competent because of the risk of isolating entire national markets. It may therefore be that antitrust investigations are conducted in parallel both at EU and national levels, in which case the national proceedings must always guarantee an effective outcome for EU proceedings.

2.2 HOW A CASE STARTS

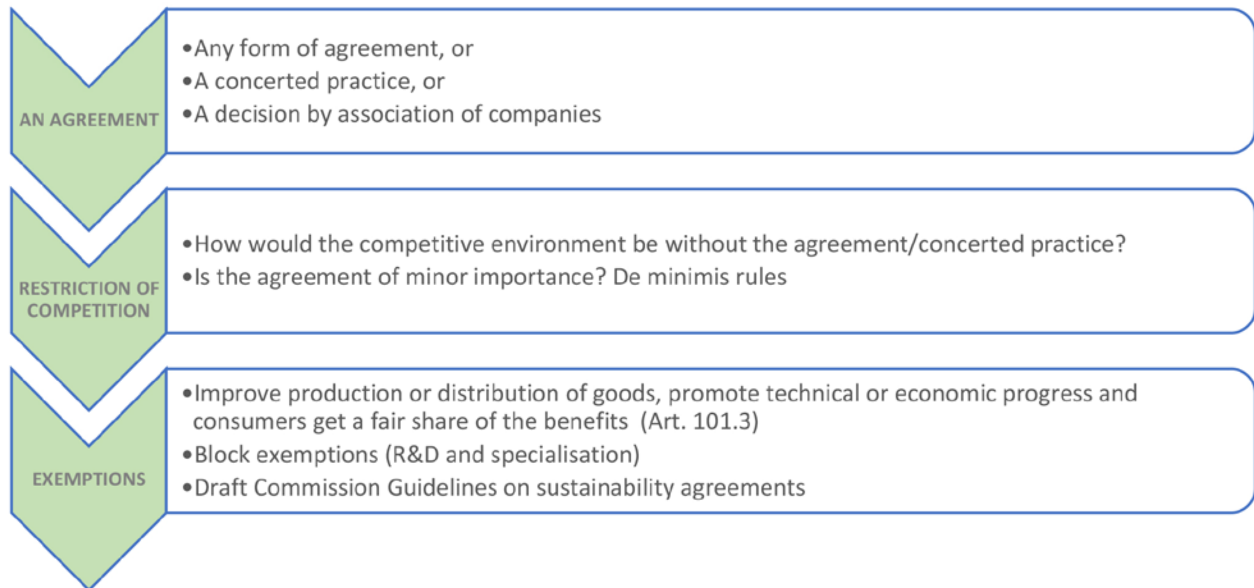
Since cartels are highly secretive, an Art. 101 investigation often starts with a tip-off. This can happen through a leniency programme, whereby the Commission encourages companies to come forward in exchange for immunity or reduction of fines. A formal complaint or whistleblowing also allows individuals or companies to report suspected infringements. As we will see in Title VI section 1.2, trade unions can envisage using this route if they wish to increase their involvement in antitrust enforcement.

Lastly, an investigation can be conducted ex officio when the Commission believes that a market is not working as well as it should due for instance to a lack of new entrants or price rigidity.

4 Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82

2.3 THE ASSESSMENT

Figure 9 Overview of Art. 101 assessment



Art. 101 prohibits behaviours that 1) constitute an agreement or any other concerted practice and 2) are anti-competitive.

The EU competition authorities have a broad understanding of the notion of agreement. The will of the parties does not have to be a formal contract, which is rarely the case anyway as cartels are usually highly secretive. Evidence of concerted practice can take the form of a non-binding gentleman's agreement or event tacit assent where, for instance, a company refrains from denouncing a suspected infringement by their business partner.

Even if it is not possible to establish an actual will, an agreement can be inferred from coincidences and indicia, which taken together point at a concerted practice. The Commission would then be assessing behaviours that are aligned where such alignment does not make sense in a normally competitive environment and a concerted action would therefore be the only plausible explanation.

Article 101 applies to all forms of undertakings. The Court of Justice of the European Union (hereafter "CJEU") has thus accepted the application of Art. 101 not only to companies but also professional associations[5] or international payment organisations[6] from the moment that these organisations may have an influence on the behaviour of their member companies. As we will see in the following section 3.1, the Court has also ruled that trade unions and self-employed workers may come under the application of Art. 101.

The second element triggering an Art. 101 prohibition is that the concerted practice or agreement has as its objective or effect the prevention, restriction or distortion of competition. The Commission evaluates the potential state of the competition environment in the absence of the investigated behaviour. In making that assessment, the Commission will judge whether the agreement has a real or potential restriction on competition.

As described in the above section 2.1, the suspected infringement must affect trade between Member States. In addition, the Commission applies de minimis rules[7].

5 T-90/11

6 C-382/12 MasterCard

7 Agreements are considered of minor importance, and thus not appreciably restricting competition: (a) in the case of horizontal agreement, if the aggregate market share held by the parties to the agreement does not exceed 10% or (b) in case of vertical agreement, if the market share held by each of the parties to the agreement does not exceed 15% in any of the relevant markets affected by the agreement. In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors, the 10% threshold is applicable.

The de minimis exemptions do not apply to serious restrictions such as price fixing, limiting production and geographical restrictions (European Commission, 2014).

2.4 EXEMPTIONS

According to Art. 101.3, prohibitions can be lifted if the agreement, concerted practice or decision has beneficial effects that outweigh its anti-competitive impact. These exemptions must meet four conditions.

First, the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress. The Commission will look at efficiency gains, through the lowering of cost of production, the improvement of product quality or innovation. Examples include exclusivity clauses that allow stability of supply, as well as research and development agreements.

The second condition is that the individual consumer buying the product in question must receive a fair share of the resulting benefits. The effect of these agreements must be that they offer better products, a wider selection or better prices. The consumer welfare standard exclusively governs the exemption. The interests or potential losses of other stakeholders, such as communities affected by environmental impact and workers, are in principle not assessed by the Commission. This has attracted criticism and the Commission is considering a new instrument to try to introduce at least an environmental dimension in these exemptions. We come back to this in the following section on sustainability agreement.

The third condition is that the restrictions to competition are indispensable to the attainment of the above-mentioned objectives. In other words, the beneficial effects of the agreement could not be reached under a normal competition environment.

Lastly, competition must not be eliminated altogether.

Certain categories of agreements benefit from “block exemptions”, which are listed in Commission and Council regulations (e.g. the automotive aftermarket). These block exemptions establish a presumption of conformity with Art. 101.

Council Regulation 2821/71 defines certain R&D and specialisation agreements that can be considered as beneficial to competition (Council, 1971). Council Regulation 19/65 concerns certain categories of vertical agreements to which only two undertakings are parties (Council, 1965). Council Regulation 1534/91 exempts certain practices in the insurance sector, such as common risk premium tariffs based on collective statistics, common standard policy conditions, common coverage of risks, etc. (Council, 1991). These Regulations undergo regular review by the Commission.

Sustainability agreements

The EU Green Deal, launched in December 2019, consists in a set of proposals aiming at reducing carbon emissions by at least 55% by 2030 (European Commission, 2019). In this context, the competition services of the Commission are considering a revision of horizontal block exemption regulations on R&D and specialisation agreements.

The idea would be to relax antitrust rules for agreements between competitors that contribute to the greening of the economy or, more broadly, may generate substantial economic and sustainability benefits, as long as the consumer also gets a fair share of those benefits. Agreements between competitors pursuing sustainability objectives would then enjoy the benefits of block exemption from antitrust rules so long as they do not contain hard-core restrictions and when the joint market shares of the parties to the agreement do not exceed specific thresholds (DG Competition, 2022).

It is still unclear how the monitoring of such agreements would take place. Importantly from a trade union perspective, it remains to be seen to what extent employment would be considered as one objective that sustainability agreements may be pursuing (for instance joint investment in training programmes).

3. The employment dimension of antitrust rules

3.1 THE EMPLOYMENT IMPACT OF "SUSTAINABILITY AGREEMENTS"

Including sustainability objectives in the application of antitrust rules could constitute a first step towards the broadening of the consumer welfare standard to better take into account environmental and social goals.

The risk, however, is that, in the absence of appropriate monitoring, profit-seeking businesses will primarily look at strengthening market power, using their contribution to sustainable investment as a means to an end. Employer dominance is very prejudicial to employment levels and working conditions if it is not counterbalanced with sufficient bargaining power on the side of the workforce.

We will detail in Title VI how the sometimes unavoidable concentration of industries must be accompanied by full worker involvement as well as the protection of workers' fundamental rights to bargain collectively.

It also appears from the public consultation documents that the Commission does not intend to assess the impact of sustainability agreements on employment (DG Competition, 2022).Yet, that impact can be considerable if the sustainability agreements accelerate the transition towards greener production. So far, trade union demands for just transition principles do not appear on the competition agenda. Just transition requires the anticipation of change through effective social dialogue and support for workers in the transition to new jobs. (IndustriALL, 2022)

The social dimension of sustainability agreements has also emerged in the context of a proposed Directive on corporate sustainability due diligence where the possibility of cooperation agreements to reduce the cost of compliance with the Directive has been raised[8]. Such agreements may constitute different forms of partnership. To the extent that these partnerships constitute multi-stakeholder initiatives seeking to respond to social challenges, there may be a risk of social washing, with companies pursuing ethical labels with partners of their choosing rather than through social dialogue and collective bargaining. The risk may go as far as seeing sustainability agreements replacing collective agreements.

Overall, questions should be raised as to the compatibility of relaxing antitrust rules for sustainability agreements with a narrow interpretation of the consumer welfare standard. Measuring sustainability is particularly sensitive to outside factors, such as social, public policy and environmental norms. A narrow focus on consumer welfare is unlikely to authorise sustainability agreements that are beneficial for climate action if these agreements may also lead to higher prices or reduced choice for consumers. Furthermore, the scope for accommodating an employment dimension appears inexistent.

8 Proposal for a Directive on Corporate Sustainability Due Diligence COM (2022) 71 final, 23.2.2022

3.2 IS A COLLECTIVE AGREEMENT AN ANTI-COMPETITIVE PRACTICE?

The FNV case law

Whilst collective agreements do not as a principle fall within the scope of EU antitrust rules, the situation becomes more complex when it comes to agreements by trade unions on behalf of selfemployed workers[9].

In the landmark ruling *Albany*[10], the EU Court of Justice ruled that collective agreements between management and labour fall outside the scope of EU prohibitions under Article 101 TFEU. That case related to the compulsory affiliation of a Dutch employer to a supplementary pension scheme.

Whilst recognising that the restriction of competition is an unavoidable consequence of agreements between employers and workers, the CJEU also referred to the social objectives of the European Treaties.

The Court found that this social dimension would be seriously undermined if management and labour were subject to the prohibition of Art. 101. As a result, their agreements cannot be considered as infringing competition rules.

However, the CJEU has taken a different stance when the workers covered by the collective agreement are self-employed. In a 2014 ruling[11], the Court held that self-employed workers must in principle be regarded as undertakings for the purposes of competition law and that a trade union negotiating on their behalf might therefore become subject to antitrust rules. In that case, the FNV musician union concluded with an employer's association a collective agreement relating to musicians subcontracting for members of an orchestra.

In its judgment, the EU Court did not repeal the Albany case law. It did, however, rule that selfemployed workers must be regarded as undertakings. Thus, a trade union negotiating on their behalf is not acting as a social partner but as an association of undertakings. The Court also noted that, whilst the EU Treaty encourages dialogue between management and labour, it does not do so for self-employed service providers. The Court tempered its judgement by emphasising the difference between a genuine and a false self-employed worker, adding that the prohibition does not apply to the false self-employed.

In a context of increasing power asymmetry in labour relations, the application of antitrust rules to self-employed workers can be prejudicial to freelance workers when they are in a weaker position than the other side of the industry. It is also problematic for platform work, where the line between independent worker and employee can be very blurred.

The Commission Guidelines

In the light of these difficulties, and considering parallel EU action to address the working conditions of platform workers, the EU Commission adopted in September 2022 a set of "Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons" (European Commission, 2022).

The Guidelines underline recent labour market developments, notably the trend towards subcontracting and outsourcing business and personal services, as well as the digitalisation of production processes and the rise of the online platform economy. In a context where solo employed persons face difficulties in influencing working conditions, collective bargaining is considered a legitimate and important means to improve the imbalance that individual self-employed workers experience in terms of bargaining power vis-à-vis their counterparty/-ies.

9 For more information on trade unions protecting self-employed workers, see Fulton, L. (2018) Trade unions protecting self-employed workers, ETUC, Brussels

10 Albany, C-67/96 of 21 September 1999

11 FNV Kunsten Informatie en Media, C-413/13 of 4 December 2014

Thus, the Guidelines clarify that i) certain categories of collective agreements fall outside the scope of Article 101 TFEU, and ii) the Commission will not intervene against certain other categories of collective agreements.
For both categories, the protected collective agreements are those regulating working conditions, which include matters such as remuneration, rewards and bonuses, working time and working patterns, holiday, leave, physical spaces where work takes place, health and safety, insurance and social security, and conditions under which solo self-employed persons are entitled to cease providing their services or under which the counterparty is entitled to cease using their services.

The Guidelines do not extend to agreements that seek to regulate matters that are not working conditions, such as market sharing or exclusivity clauses. Further, only solo self-employed workers are concerned, i.e. those who work alone without any employees. On this, the Commission relies on the concept of personal labour, which is defined as relying *primarily on [one's] own personal labour for the provision of the services concerned*.

Collective agreements that fall outside the scope of Art. 101 are those covering the self-employed who are in a situation comparable to employees. Three types of self-employed workers fall into this category.

First, solo self-employed people who provide services exclusively or predominantly to one company. Here, the Guidelines partly codify the FNV case law, which had already established a distinction between the genuine and fake self-employed, taking into account economic dependency. The Commission quantifies economic dependency, considering that a solo self-employed person is in a situation of economic dependence where that person earns, on average, at least 50% of total workrelated income from a single counterparty, over a period of either one or two years.

Second, the solo self-employed who perform the same or similar tasks side by side with employees of the same counterparty. Remarkably, the Guidelines specify that these solo self-employed people should be able to enter into collective agreements irrespective of whether or not they should be reclassified as employees. Thus, the Commission clearly announces its intention to broaden the approach taken by the EU Court in the FNV case.

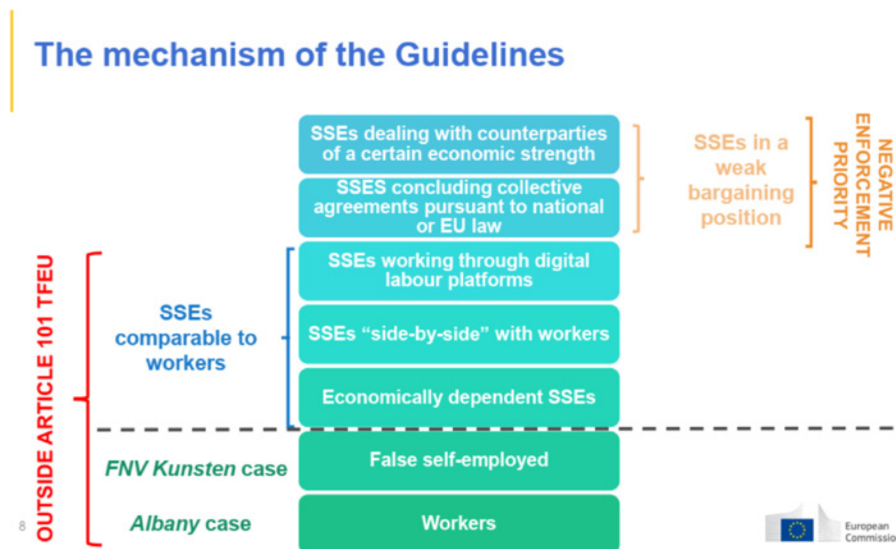
Third, the solo self-employed working through digital labour platforms. According to the Guidelines, they are in a comparable situation to employees due to their dependency on the platform and limited ability to negotiate working conditions and remuneration.

Collective agreements that will not trigger EU enforcement are those negotiated by solo self-employed people who are also in a weaker negotiating position in relation to their counterparty/-ies, despite not falling into any of the three above-mentioned categories. This de facto immunity applies in two situations.

First, in the case of insufficient bargaining power in situations where the counterparty has a certain level of economic strength. The Guidelines provide quantitative criteria to presume the existence of such imbalance: where the counterparty represents the whole sector or industry, or where the counterparty (or several counterparties acting jointly) has a turnover of at least EUR 2 million or staff above 10 persons.

Second, in cases where the national or EU legislator is expressly granting the right to collective bargaining. This appears to be an encouragement to the legislator to take express action to exclude from the scope of competition law agreements concluded by self-employed people in sensitive sectors, such as culture. The Guidelines underline for instance that, when it comes to intellectual property and royalties, the Copyright Directive 2019/790 grants flexibility to Member States to strengthen the contractual position of authors and performers through various mechanisms, including collective bargaining.

Figure 10 The mechanism of the Commission Guidelines on solo self-employed workers ("SSE")[12]



Next steps

The ETUC has welcomed the Guidelines as an important step towards strengthened collective bargaining and a recognition of its counteracting force to rebalance power relations in the labour market[13].

It must nevertheless be noted that these are Guidelines, and therefore soft law. Whilst they may have an authoritative effect, they are not legally binding on the EU Court of Justice nor on national competition enforcers. It therefore remains to be seen to what extent they will influence current practices so that national competition authorities refrain from interfering with the work of trade unions defending self-employed workers. A review of the application of the Guidelines is foreseen for 2030.

12 Figure 10 is an extract from a presentation made by an EU Commission official at the ETUC Netlex conference on 16.11.2022
13 Collective bargaining boost for self-employed | ETUC

TITLE III.
Dominance in the labour market

KEY MESSAGES

This Title describes the objectives and applicable rules addressing the issue of dominance: on the one hand merger control, which involves assessing whether a planned concentration between two or more economic players could reduce competition in the market, and on the other hand the abuse of dominant position, seeking to prevent large players from using their market power in a way that harms consumers.

Challenges arise as a result of a competition assessment which focuses on a technical definition of relevant markets and does not necessarily consider corporate power as a challenge in itself.

Merger controls focus narrowly on efficiency theories and consumer welfare and leave little room for the promotion of social dialogue.

From a workers' perspective, increased corporate power means increased economic dependency on a few employers. Labour market concentration has a chilling effect on wages and working conditions and is likely to be a key driver for increased reliance on unfair labour terms.

1. The principle – catching harmful dominance

As a general principle, a market where a company has acquired too much dominance is one where there is insufficient competition. However, a distinction must be established between dominance acquired as a result of internal growth and dominance acquired through external growth. Internal, or organic, growth occurs when business expands its own operations through investment in production and innovation. External growth refers to an increase in size as a result of acquisitions or mergers with external operators.

According to the CJEU, it is not the intention of the EU Treaty to ensure that less efficient competitors stay on the market[14]. Competition authorities may support dominance if it is believed to be gained through own merits, i.e. through innovation and offering consumers the best quality at the best price[15].

Thus, EU competition authorities will intervene only if it is considered that dominance has harmful effects on markets. This is done in two ways. Controls of mergers and acquisitions scrutinise whether a planned concentration between two or more economic players would significantly reduce competition in the market. Through the prohibition of abuse of dominant positions, the EU competition authorities seek to prevent large players from using their dominance in a way that harms consumers.

2. What is dominance? The notion of markets

In order to assess the existence of a position of dominance, it is necessary to look at the perimeter within which there is competition between companies. Corporate power and market power should not be confused.

Corporate power is a term often used in connection with the concentration of capital ownership. Evidence of corporate power will come in the form of increased markups – i.e. the ability of a firm to charge an excessive price, well above the cost of production – and increased profitability. As we have described in Title I. section 2.2, all indicators are now evidencing increased corporate power and industry concentration across sectors.

14 CJEU, 6.09.2017, Inter vs Commission C-413/14
15 Tetra Pack T-83/91; Intel

Market power, the notion used by competition authorities, is typically narrower and relies on expert definitions of markets (Bajgar et al., 2019). From this perspective, the notion of power is more relative and industry concentration a less relevant concept. Applying an economic test, a multinational enterprise could be considered as dominant overall because of its ability to increase markups and profit levels but be investigated by competition authorities only sporadically, in relation to specific products or services. Crucially for trade unions, a market definition exclusively based on assessing individual products and services does not allow the identification of concentration in labour markets (see section 0 below).

A market is defined as the market including all products or services that the consumer considers substitutable by reason of products' characteristics, prices and intended use (European Commission, 2021). Substitutability for consumers often involves a subjective analysis based on surveys and market studies. For instance, there can be an evaluation of consumers' reaction to a small but significant non-transitory increase in price ("the SSNIP"). If prices increased by 5-10%, would customers turn to other products? If so, these substitute products should be considered part of the same market.

There may also be cases where the market is defined according to objective criteria. This is the case for medicines, which have their own market due to strict regulations for their authorisation. Another example is transport: long-distance air and maritime transport are different markets because they cannot reasonably be considered interchangeable.

Supply-side substitutability may also be taken into account if the company is able to change its production at no or limited cost. When that is the case, additional products will be grouped into one product market, even if the products are not formally substitutable for the final consumer. This would be the case for instance for paper production, where manufacturers are able to quickly adjust their production at low cost to offer various types of paper.

Finally, a geographic market is defined. This is the zone in which objective conditions for competition are comparable for all operators. Competition authorities will look at infrastructure, transport and cultural factors, as well as legal barriers that may hinder entry of new operators.

Recent decisions have attracted criticism of the methodology used to define a geographic market. As described in Box 2 Prohibitions – the examples of Alstom-Siemens and Tata Steel-Thyssenkrupp, questions arise as to whether the state of competition should be assessed globally or by reference to European markets only.

Once the market is defined, the Commission only has to look at the number of market share held by a company to assess dominance. This share corresponds to the percentage of total sales that occurred in the market during the previous financial year. It may be that the company has a majority share in that market. If not, the relative importance of its share will be determined by looking at the share of competitors and the relative size of their respective shares. The bigger the gap with competitors, the clearer the dominance. According to the Commission, however, if a company has a market share of less than 40%, it is unlikely to be dominant[16].

Dominance in a given market often generates multiple impacts, not just on consumers but also on suppliers and other business partners. For this reason, some national laws, in particular in France, in Germany and in Spain, have developed the notion of economic dependence on a supplier or a customer. A company in economic dependency has no alternative counterpart for buying or selling its products. This dependency may arise because the buyer is dependent on one particular brand, because the supplier has access to a unique source of supply (for instance during a shortage) or because the customer has considerable buying power. This last hypothesis is particularly relevant for trade unions. As we will further describe in the following section 4.2, suppliers also include workers supplying their labour to dominant firms. A market definition exclusively based on substitutability from the point of view of consumers will not encompass workers' economic dependency.

16 Fines for breaking EU Competition Law (europa.eu)

3. Merger control

3.1 EU- AND NATIONAL-LEVEL COMPETENCE

The 2004 Merger Regulation provides the legal base for EU action on mergers and acquisitions[17].

The European Commission is competent to assess mergers and acquisitions with a European dimension. These concern merging firms reaching one of the following alternative thresholds.

First alternative:

- a combined worldwide turnover of all the merging firms of over €5,000 million, and
- an EU-wide turnover for at least two of the firms of over €250 million.

Second alternative:

- a worldwide turnover of all the merging firms of over €2,500 million, and
- a combined turnover of all the merging firms of over €100 million in at least three Member States,
- a turnover of over €25 million for at least two of the firms in each of the three Member States included under ii, and
- EU-wide turnover of at least two firms of more than €100 million.

The thresholds cover the turnover of the merging companies but also of any controlling or controlled entities.

A planned merger or acquisition exceeding one of these alternatives must mandatorily be notified to the European Commission, which has exclusive competence to review the operation. National competition authorities are competent, on the basis of domestic provisions, for any other operation.

If a planned concentration does not meet the EU threshold but is subject to the scrutiny of national authorities in at least three Member States, the companies concerned may ask the Commission to take over the examination. Any Member State can oppose such referral.

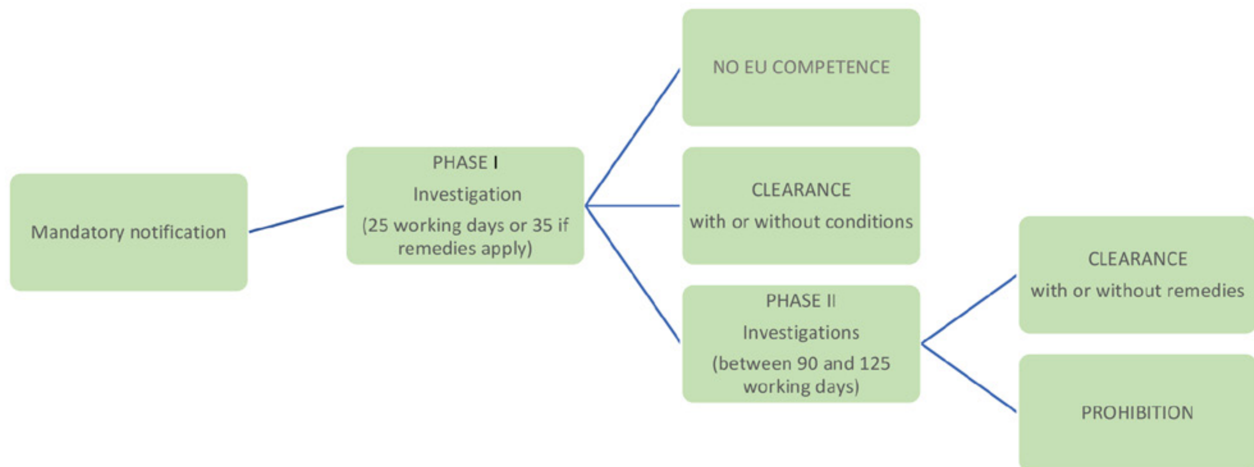
A national authority may also decide to refer a planned concentration to the European Commission because of its potential to affect trade between Member States. Conversely, the Commission may decide to refer back a case if it presents significant threats to domestic competition or because the market has distinctive national characteristics.

Finally, both the Commission and national competition authorities can be competent cumulatively in the case of legitimate interest such as public security, plurality of the media and prudential rules.

17 Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

3.2 OVERVIEW OF MERGER-CONTROL PROCEDURE

Figure 11 Overview of EU merger control



A merger takes place when two independent companies either create a new company or when one absorbs the other. For a merger to take place, there need to be two independent entities. An internal restructuring within a company group will in principle not fall under the understanding of concentration.

An acquisition takes place when one company acquires control over another. That control is defined as the possibility of exercising decisive influence on a company through a majority of votes or a transfer of ownership.

A third type of concentration is the establishment of a joint venture where two companies exercise jointly ownership and control over a third company. In a joint venture, the share of ownership is such that shareholders must necessarily reach an agreement on the business conduct. If plans for a merger, acquisition or joint venture meet the threshold described in the above section, the companies involved have the obligation to notify the Commission of the planned operation. The operation can only go ahead after the control procedure has been finalised, which means that the Commission needs to act fast.

After the notification, the Commission will analyse the deal in a maximum of 25 working days. The most frequent outcome of Phase I investigations is clearance, either unconditionally or with remedies. Remedies are commitments accepted by the parties to address the anti-competitive effects of the concentration as identified by the Commission. In the case of remedies, an additional 10 working days can be added to the Phase I investigation.

If there are doubts as to the anti-competitive effects of the deal, a Phase II investigation is triggered for a maximum period of 125 working days (90 days as a matter of principle, which can be extended by another 15 and 20 working days). Assisted by an advisory committee composed of national representatives, the Commission carries out in-depth investigations, requesting companies' internal documents, searching for extensive economic data, sending detailed questionnaires to market participants and visiting sites.

There can be two outcomes to a Phase II investigation: clearance with or without remedies, or prohibition. Judicial review is then possible in front of the European Court of Justice. Clearance with remedies is the most frequent outcome of Phase II investigations. Practice from the past years shows that very few mergers are actually prohibited (see the list of merger controls in Annex II).

In certain national laws, such as in France in particular (see Box 1 below), the decision by the national competition authority may be revisited by the competent Ministry. The Ministry will then exercise its judgment on the basis of general interest. Industrial development, competitiveness and, importantly from a trade union point of view, the safeguarding of employment can be part of such a political assessment.

Box 1 Public interest test in French merger controls – the example of William Saurin

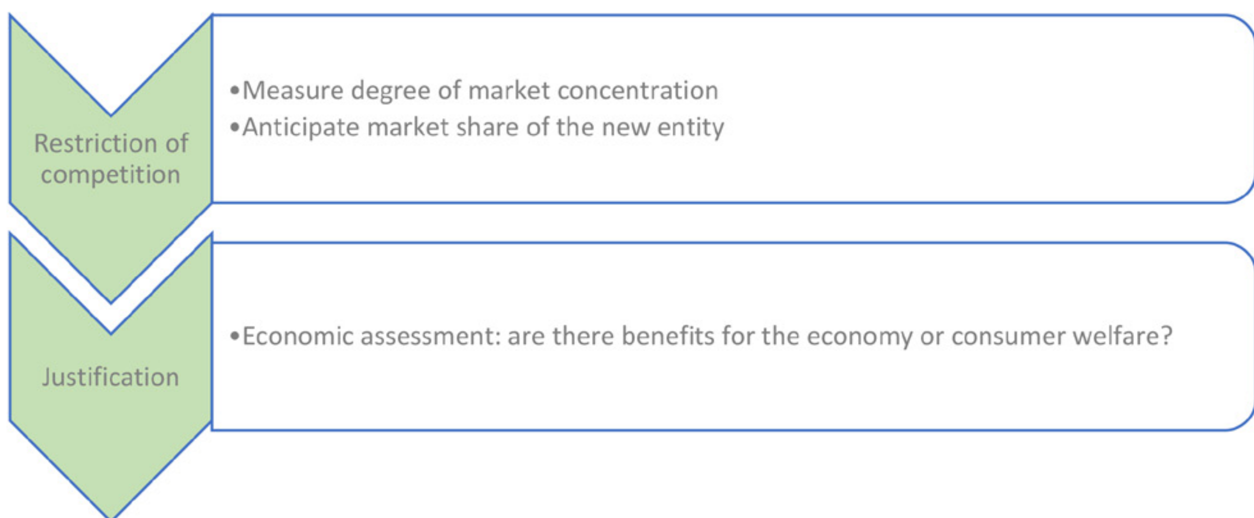
In June 2018, the French competition authority cleared with remedy the proposed acquisition of William Saurin by Cofigeo. The remedy consisted in the sale of the Zapetti brand and of a factory producing ready meals. Shortly after the decision from the competition authority, the Ministry of the Economy exercised its "right of revocation", according to which the Ministry can in 25 days review a competition decision in the name of the general interest.

The Ministry took the view that the divestment and the sales would cause risks to the financial stability of William Saurin and have a significant adverse impact on employment. According to the Ministry, 1 500 jobs were at stake within employment areas often marked by high unemployment rates and offering few prospects for retraining.

The acquisition was therefore cleared, without remedy, but under the commitment that William Saurin would undertake a significant programme of investment in the business and maintain all jobs for a period of 24 months.

Source: (Ministère de l'Economie et des Finances, 2018)

3.3 THE ASSESSMENT



The assessment of a concentration is exercised in two steps.

First, the Commission evaluates whether the planned operation can in theory have anti-competitive effects. It looks at the market share of the new entity and measures the amount of competitiveness in the market[18]. There is a risk of anti-competitive effects where the concentration would lead to or strengthen dominant positions.

Recent decisions in relation to the Siemens-Alstom joint venture and the Tata Steel-Thyssen Krupp merger attracted criticism of the current methodology to assess the state of competitiveness (See Box 2 Prohibitions – the examples of Alstom-Siemens and Tata Steel-Thyssenkrupp). In these cases, the question arose as to whether the European Commission should have assessed the state of competition globally as opposed to European markets only. At stake is the opportunity to develop "European champions" to fend off Chinese competition.

18 The common measure of market concentration also used by the Commission is the Herfindahl-Hirschamn Index (HHI). The HHI index calculates market competitiveness by squaring the market share of each firm in an industry and summing the resulting numbers. A market with an HHI of less than 1,500 is considered a competitive marketplace, a market with an HHI of 1,500 to 2,500 is moderately concentrated, and one with an HHI of 2,500 or greater is highly concentrated.

Box 2 Prohibitions – the examples of Alstom-Siemens and Tata Steel-Thyssenkrupp

On 6 February 2019, the Commission prohibited the proposed joint venture by **Siemens and Alstom**. According to the Commission, the joint venture "would have brought together the two largest suppliers of various types of railway and metro signalling systems, as well as of rolling stock in Europe. Both companies also have leading positions globally. The merger would have created the undisputed market leader in some signalling markets and a dominant player in very high-speed trains. It would have significantly reduced competition in both these areas, depriving customers, including train operators and rail infrastructure managers of a choice of suppliers and products"[19].

As a response, France and Germany published a "Manifesto for a European industrial policy fit for the 21st Century" in which they urged the European Commission to embrace more flexibility when assessing relevant markets and "to better take into account competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition"[20]. At stake in particular is competition coming from large Chinese players.

Opponents of a relaxing of competition policies have been arguing that the size of Chinese competitors in the railway and steel markets is largely due to the size of its internal market. To them, it makes more sense to address Chinese competition through the prism of trade distortions by using trade policies (Springford, 2020).

A similar debate arose in the context of a ban of a joint venture between Thyssenkrupp and Tata Steel that would combine flat carbon steel and electrical steel activities. The EU Court of Justice upheld a Commission decision blocking the operation, which claimed that the operation would have created a market leader in already concentrated markets. The concentration would have eliminated competition and likely led to increased prices for steel. Thyssenkrupp had lodged an appeal to the EU Court of justice, arguing that the Commission had failed to consider that both companies were operating in worldwide markets and that Chinese imports needed to be taken into consideration[21].

A deal will be cleared if there is no risk of dominant position. The deal also has to be cleared if the market is concentrated for a reason not linked to the planned concentration. This may be the case for instance in the context of a bankruptcy, where a competitor would in any case disappear if it was not for the acquisition.

Second, the Commission assesses whether there might be an economic justification for the concentration in that the deal offers benefits for the economy or consumer welfare, which compensate for the potentially anti-competitive effects. Here, the Commission applies an efficiency test, looking at the technical and economic progress that might be brought about by the concentration. To our knowledge, the Commission has never found such justification.

In the majority of cases, concentrations are cleared on the condition that the participating companies implement remedies to address competition concerns in neighbouring markets. The remedy generally consists in a divestment or a sale of a market segment in order to favour the emergence of more competitors. These are known as "structural remedies", i.e. measures requiring a structural change from the party concerned. In contrast, "behavioural remedies" require a certain conduct from the company. Behavioural remedies may include a commitment to secure access or interoperability of systems and to separate activities – for instance between importer and supplier.

More rarely, the concentration will be prohibited if there are serious concerns about effects on competitiveness and no adequate remedy has been proposed by the merging parties.

According to Commission figures, between December 2019 and December 2022, 42 transactions were cleared with remedies (of which 32 in Phase I), eight transactions were abandoned while under review and only two proposed transactions have been prohibited (see Annex II).

19 Commission press release (6.02.2019), Mergers: Commission prohibits Siemens' proposed acquisition of Alstom

20 franco-german-manifesto-for-a-european-industrial-policy.pdf (bmwk.de)

21 Thyssenkrupp AG vs European Commission, T-584/19 of 22 June 2022

4. The employment dimension of merger control

4.1 MERGER CONTROL AND RESTRUCTURING

A merger or an acquisition is nearly always followed by restructuring as a result of structural remedies imposed during the merger process, with an impact on employment levels, substantial changes in production processes or the organisation of work and possible offshoring. The EU framework, however, remains narrowly focused on efficiency theories and consumer benefits. Unlike some national legal frameworks which also leave room for a general interest test (see Box 1 Public interest test in French merger controls – the example of William Saurin), EU competition authorities do not assess employment nor behavioural remedies that could be taken to mitigate adverse impact on workers.

Trade unions monitoring specific cases of merger control have also come across divestment remedies required by the Commission in order to clear mergers which in fact resulted in job losses. For instance, in the context of a planned acquisition of Ilva by ArcelorMittal, the Commission requested divestment in six European production sites and lines. Trade unions unsuccessfully raised concerns about future production and jobs, considering the lack of autonomy and financial independence of several of these plants (see Box 3).

Box 3 Impact of merger control on employment – the example of ArcelorMittal

On 21 September 2017, ArcelorMittal SA (Luxembourg) notified the European Commission of their intention to acquire certain assets from Ilva (Italy). The Commission expressed concerns about an increase in the price of steel. The merged entity would have controlled over 40% of the production capacity for carbon steel products, with a far larger market share than any of its competitors in Europe. The Commission therefore imposed a series of remedies, including divestment of plants in four countries.

The European Trade Union Federation IndustriALL registered as an interested third party. In that capacity, it made a written submission and took part in various hearings with the EU Commission, in coordination with its affiliates from the Member States concerned and with the support of an expert in steel production capacity.

With regard to divestment, IndustriALL expressed strong concerns about the lack of guarantees for future production and jobs. They noted in particular that the plants were not autonomous nor financially independent from the rest of the group. A divestment would therefore threaten over 15,000 jobs.

As a result, trade unions asked that the remedies be acco panied by social dialogue at both local and European levels, with a view to negotiating long-term guarantees for employment, quality of jobs, production levels and an investment plan.

The EU Commission did not follow these demands, considering that they were not directly related to competition concerns.

Dominant employers in the labour market – definition and impact of labour market monopsonies

A labour-market monopsony is a situation where only a few employers compete for workers. This leads to an imbalance of power between employers and labour, which itself feeds into lower employment and wages.

In a labour market that is "fully competitive", employers compete with each other to attract and retain workers. This competition forces every individual employer to pay a wage exactly corresponding with the rate at which labour demand equals labour supply. Any attempt at paying a wage below this market equilibrium would result in all workers leaving the firm immediately to take up a job elsewhere.

Things are quite different when the labour market is not "fully competitive", that is to say a situation where the employer is unlikely to be confronted with a complete lack of workers on offer. Instead, the employer can itself, to a certain degree, set the wage below a certain level while still being able to command a certain volume of labour (Marinescu, 2018).

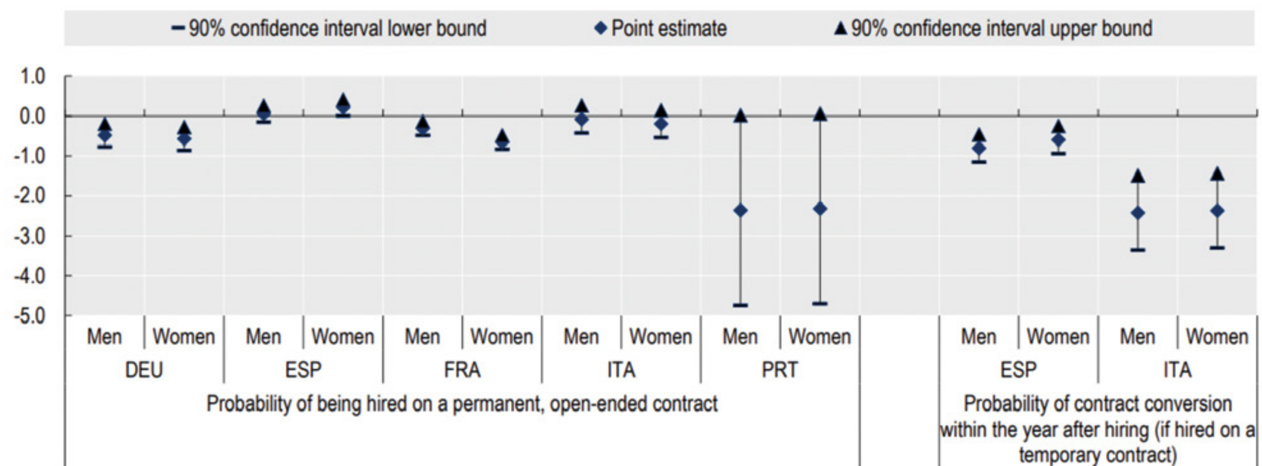
Labour-market concentration is now a lasting trend throughout the OECD. According to the 2022 OECD employment outlook, at least one in six workers are employed in concentrated labour markets, with larger shares in rural areas and among frontline workers (e.g. retail and health) (OECD, 2022). Markets are highly concentrated in 60% of US labour markets, accounting for 20% of US employment (Marinescu, 2018).

Similar findings are also emerging in Europe. A recent study estimates that in the EU increasing market concentration by 10% reduces wages by 0.19% in Germany, 0.22% in France, 0.25% in Portugal and 0.29% in Denmark. It also reduces the probability of being hired on a permanent contract by 0.46% in France, 0.51% in Germany and 2.34% in Portugal. In economic terms, and keeping in mind the wide income distribution in these four Member States, a 10% increase in labourmarket concentration should be understood as a very small increase but with significant effects on wages (Bassanini, 2022).

Figure 12 Labour-market concentration depresses wages
Percentage wage effect of a 10% increase in labour-market concentration

Source: (Bassanini, 2022)

Figure 12 Labour-market concentration compromises job security
Percentage effect of a 10% increase in labour-market concentration



Source: (Bassanini, 2022)

Drivers for employer dominance

Overall, a common factor to all labour-market monopsonies is that employer power is not compensated for by sufficient bargaining power on the side of the workers. In this respect, the decline in collective bargaining coverage and trade union density has had a significant impact on increasing asymmetries in labour markets.

As far as labour-market concentration is concerned, an obvious driver is the increased concentration of industries, which is now a lasting trend both for manufacturing and non-financial services. Dominant firms hire a large share of the potential workforce, and workers do not have sufficient countervailing power to force higher wages and better working conditions.

That said, labour-market monopsonies should be understood as a dynamic concept. Even in sectors with relatively competitive industries, workers can still face monopsonist markets. For instance, outsourcing and subcontracting are increasingly relied upon by businesses in order to reduce costs.

Splitting off functions that were once managed internally, a business strategy which David Weil describes as "fissuring workplaces", weakens bargaining positions and drives down labour costs (Weil, 2014)[22].

From a competition angle, a main contractor which is a dominant firm in its market is in a position to dictate strict terms and conditions to its subcontractors or franchisees. Usually, this leads to a downward pressure on labour costs within the subcontractor or franchisee's firm (Council of Economic Advisers Issue Brief, 2016).

Labour market frictions can also lead to monopsonies. For instance, the excessive use of "noncompete" clauses or "non-poaching" agreements reduces workers' ability to seek better employers.

We will further describe this aspect in the following section 5. Firms can also engage in giving workers irregular schedules, to prevent part-time workers from finding additional employers.

An ill-adapted EU framework

Labour-market monopsonies are not on the radar of EU competition authorities. This is due to a strict application of the consumer welfare standard, whereby the EU competition authorities are mostly interested in innovation, choice and price from a consumer perspective.

Overall, while it is now undisputed that industry concentration is on the rise and that multinational enterprises are becoming bigger and bigger, consumers are also more than ever enjoying the choice offered by an innovative and very diverse range of products and services. Efficiency tests and impact on consumer choice have led competition authorities to refrain from taming corporate power for fear they would kill the goose that lays the golden egg (Meagher, 2020).

In particular, the methodology for market definition does not allow the identification of labourmarket concentration. As we have described in the above section 2, relevant markets are currently assessed from the subjective point of view of consumers and almost exclusively in relation to products and services in the downstream market. No resources are invested in measuring the degree of concentration of labour markets and its impact on wages and working conditions.

Furthermore, the EU Commission pays little attention to common ownership of firms if they are not direct competitors in the downstream market. This narrow assessment fails to capture corporate power and the realities of today's multinationals and ecosystems. Company ownership is now rarely about a single activity. But whilst the range of products and services in the output markets can be very diverse, and thus appear on the surface disconnected, the global operational and labour strategy piloted by the controlling firm remains the same across the entire corporation.

22 To address fissuring workplaces, trade unions are increasingly calling for a legislative framework to more strictly regulate and shorten subcontracting chains. Collective bargaining strategies also seek to extend the scope of collective agreements negotiated with the main contractor to outsourcing companies (Cremers, 2021).

5. Abuse of dominant position

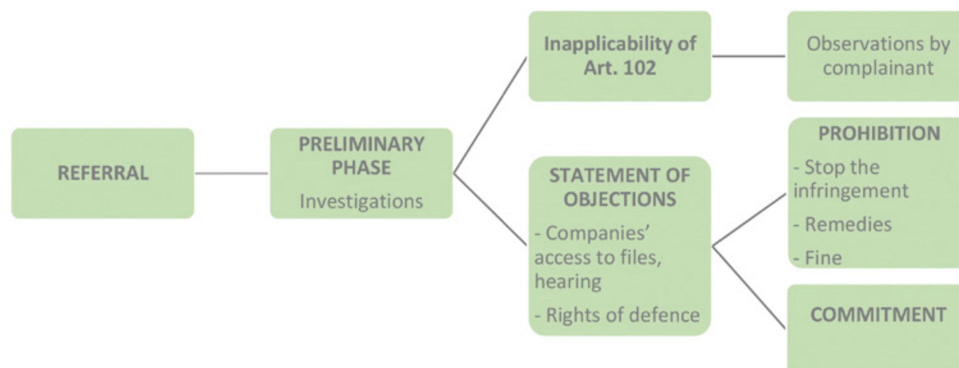
5.1 EU- AND NATIONAL-LEVEL COMPETENCE

The division of competence between the EU and Member State is similar to that applicable to cartel investigations. The European Commission's competence is triggered when trade between Member States is potentially affected by a prohibited practice.

National competition authorities are competent to investigate national and localised behaviours.

5.2 OVERVIEW OF ART. 102 PROCEDURE

Figure 13 Investigation for abuse of dominant position – overview of process



As previously described, dominance is not prohibited per se. The EU competition authorities will intervene where it is suspected that a company abuses its dominant position. This may happen for instance through charging unfair prices, pressurising unwanted services or imposing conditions that may eliminate or prevent the entry of competitors. Often, the company is able to behave in such a way because the competition on the market is already weak.

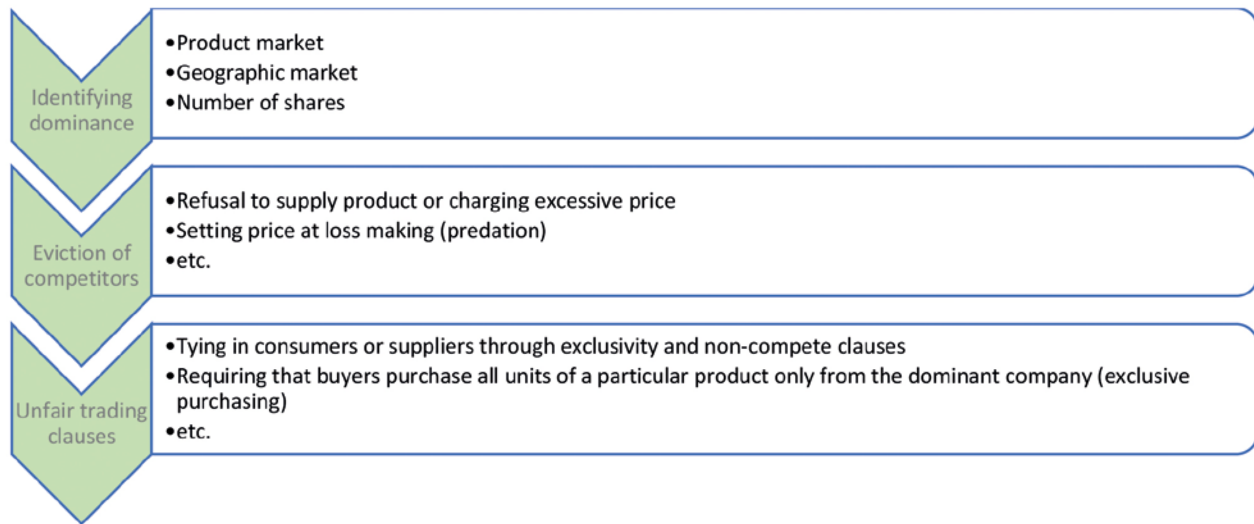
The Commission's investigative powers to enforce Article 102 are detailed in Regulation 1/2003[23], the same text used for antitrust enforcement. Thus, the applicable procedure is very similar to that applying under Art. 101.

The very first step in the procedure is to confirm the existence of a dominant position by looking at the state of competition between companies. To do so, the EU Commission applies a complex market test, largely based on a subjective analysis of what consumers may consider substitutable products or services. A company with a market share of less than 40% is unlikely to be found dominant (see above section 2: What is dominance? The notion of markets).

23 See above note 4

5.3 THE ASSESSMENT

Figure 14 Overview of Art. 102 assessment



If a company is found to be in a dominant position, the EU Commission pursues its investigations to determine if the incriminating behaviour tends to evict competitors or constitute unfair terms and conditions which the company could not afford in a normal competition environment, i.e. if they were not in a dominant position. An abuse of dominant position does not necessarily have to take place in the same market as the one in which the company is dominant.

Eviction of competitors could for instance take place if a dominant supplier decides to enter the downstream market and refuses to supply its products to other distributors or charges excessive prices for them. Other censured practices include tying in consumers through exclusivity and noncompete clauses, requiring that buyers purchase all units of a particular product only from the dominant company (exclusive purchasing). Dominant players may also abuse their positions to charge prices at a loss-making level with a view to evicting other competitors or entering new markets or market segments.

A series of high-profile cases in the digital sector have given rise to record fines due to the considerable dominance of superstar firms. In 2018, a sanction of over EUR 4 billion was imposed on Google, with an injunction fining the company 5% of its annual turnover per day of noncompliance.

Through its dominant position with its smartphone operating system, Android, Google imposed restrictions on device manufacturers and mobile-network operators designed to strengthen the supremacy of its own applications as well as its online search services[24]. In a previous 2017 decision, Google had already been fined EUR 2.42 billion for abusing its dominance as a search engine by illegally promoting its own comparison shopping services online[25]. In 2004, Microsoft was fined over EUR 331 million due to its refusal to supply indispensable technology to allow interoperability between exploitation systems[26].

24 Google, 18.07.2018, AT. 40099
25 Google, 27.06.2017, AT. 39740
26 Microsoft, 24.03.2004

6. The employment dimension of abuses of dominant position

In the same way that a dominant firm is able to impose unfair trading practices upon consumers and trading partners, a dominant employer may be able to impose employment conditions that seek to tie the workforce to the company and thus to further strengthen employers' power over individual workers. Employers are usually able to do so where labour markets are already concentrated. Labour market monopsonies and the decline in collective bargaining coverage on the side of the workers are therefore drivers for unfair labour practices.

Unfair labour practices include for instance "wage fixing" and "non-poaching" agreements, whereby firms agree not to compete on wages or not to "poach" workers from each other. Competition authorities worldwide are increasingly willing to scrutinise these as part of anti-cartel investigations (OECD, 2019)[27]. From an EU policy perspective, the EU Commission is currently considering these agreements because of their adverse impact on innovation. The EU Commissioner for Competition Margrethe Vestager declared in October 2021: *some buyer cartels do have a very direct effect on individuals, as well as on competition, when companies collude to fix the wages they pay; or when they use so-called "no-poach" agreements as an indirect way to keep wages down, restricting talent from moving where it serves the economy best*[28]. This is an area worth investigating for trade unions, especially as antitrust proceedings offer several opportunities to take an active role in the investigation (see Title VI, section 1.2).

Trade unions are also reporting additional forms of unfair labour clauses which do not seem to have appeared on the EU Commission radar. These includes in particular a surge in "non-compete" clauses, preventing employees from working at a competitor. Whilst non-compete clauses may have some justification for highly specialised workers handling trade secrets, they are clearly abusive for all other workers.

In the case of platform work, the use of algorithms unilaterally rating workers or creating lock-in effects can also be considered anti-competitive practices if they generate the same effects as nopoaching agreements and abusive non-compete clauses, i.e. making it more difficult for the individual worker to change employer. Legislation regulating data ownership and portability may have a strong role to play in this area.

27 To some extent, competition concerns in labour markets may also be dealt with in employment legislation. For instance, the Dutch Labour and Employment Law regulates the use of non-compete clauses – having regard to their length and geographical scope.

28 Speech by EVP M. Vestager at the Italian Antitrust Association Annual Conference – "A new era of cartel enforcement" | European Commission (europa.eu)

TITLE IV.
State aid in the form of public investment in the private sector

KEY MESSAGES

This Title describes the state aid rules applicable to financial support to private companies.

Whilst there is a prohibition in principle, a substantial body of exemptions is also available, reflecting the fact that the EU is a mixed economy. It is accepted that public intervention might be necessary to pursue policy choices. As a consequence of the substantial body of exemptions, the volume of state aid in the EU is significant.

EU governments have largely used these exemptions in the context of deep economic disturbance of the economy (such as the financial crisis, COVID or the war in Ukraine).

These support packages do not usually contain social conditionalities, which would provide stronger guarantees for the maintenance and creation of employment.

State aid for non-COVID-19 measures is also on the increase. In 2020, the EU 27 and the United Kingdom spent EUR 156.36 billion on state aid for non-COVID-19 measures, excluding aid to railways. This corresponds to 0.99% of total 2020 GDP, covering around 41% of the total spending. Member States spend the most on environmental protection and energy savings.

The EU Commission has a more prudential policy when it comes to supporting individual companies in difficulty. This particular type of aid is very relevant for the safeguarding of jobs, especially as they involve the drawing up of restructuring plans.

Poor enforcement of EU labour rules is not considered illegal state aid, even if it arguably grants a competitive advantage to service providers, akin to discriminatory tax rules.

1. The principle – a prohibition with substantial exemptions

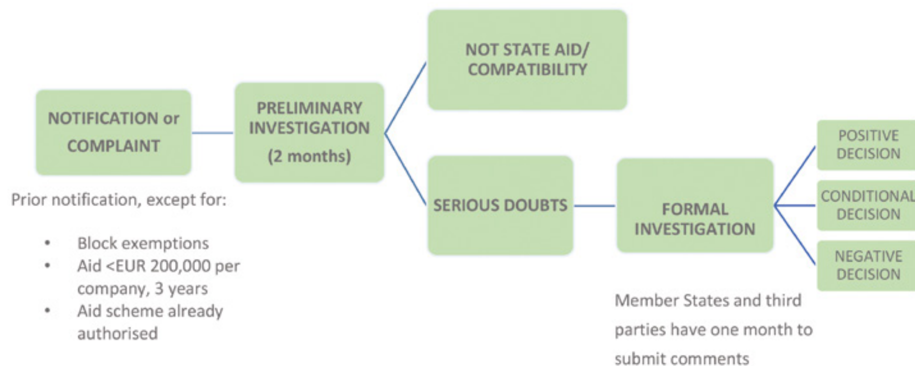
State aid control comes from the desire to maintain a level playing field for all businesses active in the Single Market, no matter in which Member State they are established. The starting point is that Member States should not confer upon individual companies an undue advantage over their competitors. Functioning markets are considered an essential element in providing consumers with the products they wish to obtain, at low prices. Furthermore, free competition is seen as essential to enhance the competitiveness of the European economy, as it is expected to create an environment in which efficient and innovative companies are rewarded properly.

That said, Article 3.3 of the Treaty on the European Union also establishes the principle that the EU is a "highly competitive social market economy". Thus, the EU is a mixed economy, i.e. a system where the market is combined with government interventions. The prohibition of principle of state aid to private companies is accompanied by a substantial body of exemptions. It is indeed accepted that public intervention might be necessary to offset market failures.

During the 2007-2008 Global Financial Crisis, such exemptions were largely relied upon to allow bailouts to financial institutions. Similar exemptions have been granted with the objective of rescuing and restructuring companies in financial difficulty in the context of the pandemic or the energy crisis.

2. Overview of state aid procedure

Figure 15 Overview of state aid procedure



Art. 107 TFEU determines the principles of incompatibility or compatibility of state aid with the internal market. Art. 108 entrusts the Commission with the task of controlling the aid. Art. 109 is the legal base for the Council to adopt appropriate regulations.

The EU Commission is exclusively competent to assess any aid measure exceeding EUR 200,000 per company over any period of three fiscal years. These measures must mandatorily be notified to the Commission, and Member States are required to wait for the Commission's green light before they can give effect to the measure.

The following aid measures are exempted from notification:

- Aid covered by a block exemption Regulation;
- Aid scheme already authorised by the Commission.

Every notification triggers a preliminary investigation over a maximum period of two months. An investigation may also start "ex officio" following a report by a third party or as a result of whistleblowing.

The investigation will come to an end after that preliminary investigation if it appears that the measure in question does not constitute state aid or if it is state aid compatible with the internal market.

If there are serious doubts as to the compatibility of the measure with Art. 107, a second-phase investigation is opened involving the publication of the opening and exchanges with Member States and third parties. Although there is no formal deadline for a formal investigation phase, third parties and Member States have a one-month deadline to submit their observations. As we will describe in Title VI, trade unions therefore have a tight window to present their observations at this stage.

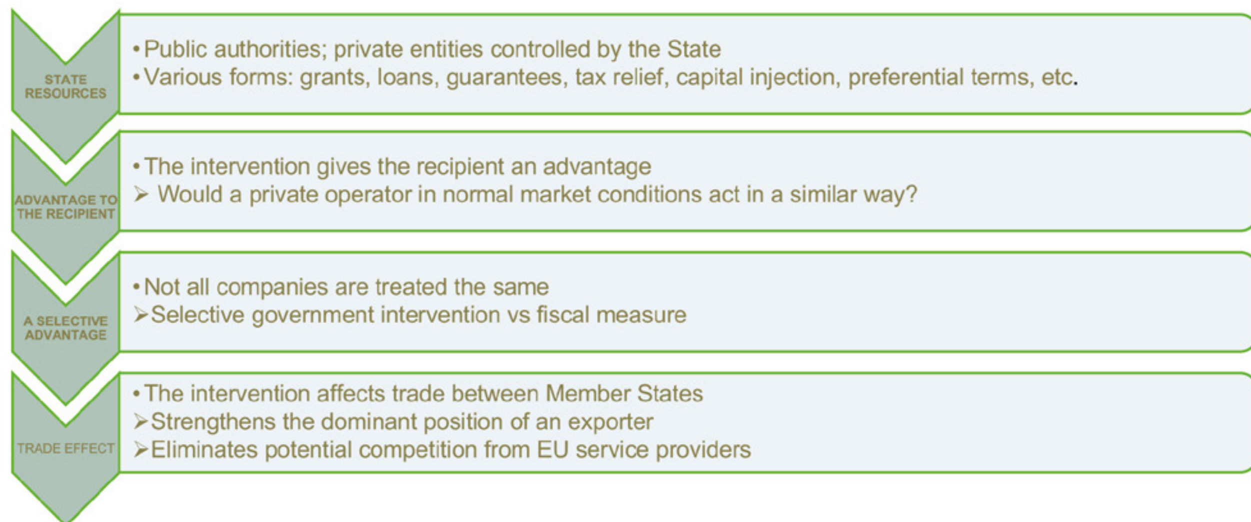
A second-phase investigation may have one of three outcomes:

- there is no aid or the measure is deemed compatible with Art. 107 (positive decision);
- the measure is compatible but some conditions must accompany its implementation (conditional decision);
- the measure is incompatible with Art. 107 and cannot be implemented (negative decision).

Unlawful aid granted without prior Commission authorisation must be recovered by the Member State with interest from the beneficiary.

3. The assessment

Figure 16 State aid – Art. 107 and 108 assessment



The first step in a state aid investigation is to determine whether the measure constitutes state aid within the meaning of EU law. According to Art. 107.1, there are two elements that determine state aid.

First, the measure has to be financed through state resources.

"State" encompasses all public authorities but also private entities if they have been entrusted with the task of managing public funding and to the extent that the state exercises a controlling influence on the entity in question.

"Resources" means transfer or commitment to transfer public funds to a private entity. The aid can take a variety of forms: grants, commitment to buy goods or services on favourable terms, interestfree loans, tax relief, guarantees, government holdings of company shares etc.

The EU Commission has also considered that corporate tax incentives can constitute state aid because the targeted measures enable artificial corporate constructions in national law, allowing corporations to shift corporate profits away from higher tax jurisdictions. This reasoning, however, is very uncertain as the CJEU has ruled that the Commission did not succeed in showing that the disputed tax advantages constituted state aid[29].

Second, the intervention must favour the recipient. To determine the existence of a favour, a comparison is made between the behaviour of the financing authority and the behaviour of a private operator operating in normal market circumstances. If it appears that the aid would have not been granted by a private operator because it does not serve its interests, the measure in question is a favour constitutive of state aid. For instance, to decide whether capital injections constitute state aid or not, the EU Commission will compare the profitability of the government operation and the profitability of a private operator expecting a minimum level of return on its investment.

An example is the recapitalisation of Alitalia. In June 2005, the Commission decided that the capital increase did not constitute state aid, provided the Italian government complied with conditions to ensure that this operation would be the equivalent of a private investment in terms of price and relations with banks[30].

29 Ireland vs Commission T-778/16 of 15.07.2020. See also FIAT T-755/15 and T-759/15 of 8.11.2022, where the CJEU annulled the Commission decision that Fiat had been granted illegal state aid. In its press statement, Vestager interestingly notes (despite the loss) that "*Even if the Commission's decision was annulled, the judgment gives important guidance on the application of EU State aid rules in the area of taxation. The Court confirmed that action by Member States in areas that are not subject to harmonization by EU law is not excluded from the scope of the Treaty provisions on the monitoring of State aid.*"
https://ec.europa.eu/commission/presscorner/detail/en/statement_22_6690

30 Alitalia, C(2005)1651

In the presence of a state aid measure, the investigation continues to determine whether there is incompatibility with EU law. Article 107 prohibits state *aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods (...) in so far as it affects trade between Member States* (...).

There is distortion of competition when the aid gives an advantage on a selective basis, not granting the same treatment to all companies in a similar situation. If the state intervention is general and does not discriminate between companies, it will be considered a general economic or fiscal decision, not state aid prohibited by Art. 107. The measure is considered selective if it is granted to an individual company or a group of companies in specific sectors or located in specific regions.

Finally, prohibited aid affects trade between Member States. This would be the case in particular of a measure that has the effect of strengthening the position of a company that exports to other Member States. It would also be the case if the measure would eliminate potential competition of non-national competitors. In general, the larger the market power of a recipient the more likely that trade between Member States will be affected.

4. State aid compatible with the internal market

Figure 17 Overview of state aid compatible with internal market

Aid always compatible (Art. 107.2)	Aid that may be compatible (Art. 107.3)	Block exemptions (Art. 109)
• aid with social character, granted to individual consumers • aid to make good damages caused by natural disasters or exceptional occurrences • aid to compensate for economic disadvantage caused by division of German territory	• regional aid to promote economic development • aid to promote a project of common European interest • aid to remedy a serious disturbance in the economy • aid to facilitate development of certain economic activities or economic areas • aid to promote culture and heritage conservation	12 categories of exempted state aid (Reg 651/2004), including: • R&D and innovation • training • disadvantaged workers and workers with disabilities

4.1 OVERVIEW

The EU Treaty leaves significant room for exemptions from a state aid prohibition. This is to reflect that public intervention might be necessary to pursue policy choices.

Art. 107.2 lists three types of aid that should always be considered compatible with the internal market:

- Aid having a social character, granted to individual consumers as long as that aid is granted without discrimination related to the origin of the products concerned. State aid to consumers to support the purchase of new cars would constitute such a measure.
- Aid to make good the damages caused by natural disasters or exceptional occurrences.
- Aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantage caused by that division. This provision has never been revoked and can potentially still be used.

Art 107.3 lists aid which may, depending on the facts of the case, be considered compatible with the internal market. These measures have diverse objectives and are classified in five broad categories.

- Regional aid to promote local development.

These are measures seeking to promote the economic development of the EU regions that are disadvantaged compared to the average. In its assessment, the EU Commission compares the economic impact of these interventions with their impact on the internal market.

- Aid to promote the execution of an important project of common European interest or to remedy serious disturbance in the economy of a Member State.

These measures have to be supported jointly by several Member States.

It is on the basis of this Article that the EU Commission in 2010 cleared bank bailouts as a response to the financial crisis. This is the case for instance of French, Belgian and Luxembourg measures to support Dexia following fears it could go bankrupt. The aid consisted in an important increase in capital subscription by the three authorities as well as state guarantees to secure borrowing over ten years[31].

In the same vein, the Commission relied on Art. 107.3 to issue a temporary framework for state aid measures in the context of the COVID outbreak and the Ukraine crisis. We will come back to this in the following section 4.2.

Finally, the Commission adopted in 2022 a Communication setting the criteria to assess Member State support to important projects of common European interest[32].

- Aid to facilitate the development of certain economic activities or of certain economic areas.

This type of state aid includes measures aiming at rescuing and restructuring companies in financial difficulty. These measures have potentially significant impact on the safeguarding of employment.

We will describe the applicable rules in the following section 0.

- Aid to promote culture and heritage conservation.
- Other categories as specified by decision of the Council on a proposal from the Commission.

4.2 SUPPORT IN TIMES OF ECONOMIC DISTURBANCE – COVID AND UKRAINE CRISIS INSTRUMENTS

In the wake of the COVID-19 pandemic, European governments injected liquidity into their economies at an unprecedented level. The EU Commission itself has adopted a large recovery plan.

In this context, the EU Commission President Ursula von der Leyen promised "maximum flexibility" on EU state aid rules to ensure that European businesses receive the necessary support to emerge from the crisis[33].

On 19 March 2020, the EU Commission adopted a temporary framework for state aid measures to support the economy in the COVID-19 outbreak[34]. The initial text was renewed six times and most of its provisions expired on 30 June 2022. Aid aiming at supporting investment and preventing insolvency may remain in place until December 2023.

31 Commission Decision of 26.02.2010 C(2010) 1180 final

32 Communication from the Commission – Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest – OJ C 528, 30.12.2021, p. 10-18

33 President von der Leyen on the Coronavirus crisis (europa.eu)

34 Communication from the Commission of 30.3.2020, C/2020/1863

Based on Art. 107.2 and 107.3, the COVID-19 temporary framework was designed to enable Member States to ensure that companies, especially SMEs, have access to liquidity and finance in order to allow them to recover from the lockdowns. The temporary framework enabled Member States to grant five types of aid: direct grants up to EUR 800,000 per company; State guaranteed bank loans; direct loans with favourable interest rates; safeguards for banks that channel public funds to the final recipients of the aid; and short-term export credit insurance.

The temporary framework was used by all 27 Member States, with an estimated total state aid approved of EUR 3.2 trillion (European Commission, 2022).

After over two years, the EU Commission has decided to stop renewing the COVID framework. It is indeed considered that an overall improvement in the health crisis no longer justifies such extensive state support to companies.

Shortly after, Russia's invasion of Ukraine, the related energy crisis and disruptions in supply chains prompted the EU Commission to once again adopt a temporary crisis framework. In March 2022, the Commission adopted a temporary crisis framework for state aid measures to support the economy following the aggression against Ukraine by Russia[35]. This new temporary framework, still in place at the time of writing this report, recognises that the EU economy is experiencing another serious disturbance and enables Member States to make sure that the right level of support remains available to severely impacted companies and sectors.

Based on Art. 107.3, the new framework enables Member States to grant direct aid up to EUR 400,000 per company; ensure that sufficient liquidity remains available to businesses in the form of guaranteed and direct loans; and compensate for rising energy prices.

Most recently, on 1 February 2023, the Commission published a "Green Deal Industrial Plan" to enhance the competitiveness of Europe's net-zero industry and support the fast transition to climate neutrality. Among other measures, the plan foresees easier access to public financing. To that end, the temporary state framework and the general block exemption regulation will be streamlined and simplified[36].

4.3 RESCUING AND RESTRUCTURING COMPANIES IN DIFFICULTY

According to Art. 107.3, aid to facilitate *the development of certain economic activities or certain economic areas may be compatible with the internal market if it does not adversely affect trading conditions to an extent contrary to the common interest.* This category of aid is of particular relevance for trade unions as it includes measures aiming at rescuing and restructuring companies in financial difficulty. Such support often has a direct impact on the safeguarding of jobs.

The EU Commission is very rigorous in assessing whether this aid is justified and compatible with common interest. In the 2014 Guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty[37], the Commission warns that support to firms in difficulty has to be considered the most distortive type of state aid. This is because of the risk of artificially maintaining companies that are not financially viable. Further, the Commission fears that firms that enjoy public support may embark on excessively risky and unsustainable business strategies. Lastly, the Commission is concerned about a wasteful subsidy race among Member States, benefitting the most resourceful Member States the most. This could lead to the creation of entry barriers for cross-border activities in the internal market, thereby creating an unlevel playing field in the internal market.

35 Communication from the Commission of 24.3.2022, 2022/C 131 1/01

36 Communication from 1.02.2023 on a Green Industrial Plan for the Net Zero Age COM (2023) 62 final

37 Communication from the Commission of 31.7.2014, OJ C 249

As a result, the Guidelines provide that aid to companies in difficulty should only be available as a last resort, where the company has exhausted all market options and support is necessary for a welldefined objective of common interest. According to a "one time, last time" principle, beneficiaries should be entitled to receive aid only once within ten years. Last, the Commission will assess the conditions under which the aid will be granted so as to *mitigate harmful effects and promote effectiveness in public spending*.

A company is considered to be in difficulty if it would almost certainly go out of business in the short or medium term without state aid. In this regard, the Guidelines give some precise criteria in relation to losses, insolvency and debt levels.

With regard to scope, aid to the steel sector is excluded from the Guidelines due to European and global overcapacity. Coal is also excluded as this sector is regulated in other EU instruments. The same applies to financial institutions, in view of their specific characteristics.

For all the other sectors, the Guidelines classify aid to companies in difficulty into three categories. First, rescue aid aiming at providing temporary relief for a short period, usually under six months, to keep the company afloat for the time needed to work out a restructuring or liquidation plan. The beneficiaries are companies facing a serious deterioration of their financial situation, involving an acute liquidity crisis or technical insolvency.

Second, restructuring aid involving more permanent assistance to restore the long-term viability of the beneficiary. The Commission requests that this is done on the basis of a restructuring plan and adequate own contributions. The measures usually take the form of direct aid and debt relief.

Third, temporary restructuring support targeting SMEs in the form of liquidity assistance.

For these three categories, the Commission will assess compatibility by considering the following criteria:

- Well-defined objective of common interest, such as the prevention of serious social hardship or severe market failure.

This criterion is of high relevance to trade unions as it often involves the safeguarding of employment in regions meeting difficulties in creating jobs. Other objectives include preventing risks of disruption or exit of a company with a pivotal role in the local economy.

The Guidelines specify that aid to companies in financial difficulty cannot just be about making good past losses. In line with its market efficiency approach, the Commission will therefore require that a restructuring plan is presented by the Member State with a view to restoring the long-term viability of the beneficiary. Such a plan will often include the withdrawal of insufficiently profitable activities, restructuring of activities that can be made more competitive, capital injections and debt reduction. Typically, such restructuring plans will have a significant impact on company-level collective bargaining, work organisation and overall employment levels.

- State intervention that is necessary, appropriate and proportionate.

Member States have to demonstrate that the common interest cannot be attained without state support, that the notified aid takes a form that is the least distortive of competition and that the amount is restricted to the minimum necessary.

In the case of restructuring aid, own contributions from the beneficiary will be required, as well as burden sharing with existing investors. Shareholders are expected to absorb losses in full.

- Avoidance of undue negative effects on competition and trade between Member States.

In line with the "one time, last time" principle, beneficiaries are in principle entitled to only one restructuring operation. Furthermore, companies may be required to divest assets or reduce capacity or market presence with a view to minimising distortions of competition.

- Transparency: all relevant acts and pertinent information about the aid must be made public.

Finally, it should be noted that social security schemes guaranteeing the payment of benefits to redundant employees are not regarded as state aid. However, any contribution by the State to support redundancy payments or measures to increase employability are counted as state aid. Given that such measures further the objective of reducing social hardship, the Commission consistently takes a favourable view of such aid.

4.4 BLOCK EXEMPTIONS

Art. 109 entitles the Council to issue appropriate regulations for the application of Art. 107. In its Regulation on the application of Art. 107 and 108 of the TFEU to certain categories of horizontal state aid[38], the Council has entrusted the EU Commission with significant prerogatives to authorise certain categories of aid.

Accordingly, a 2014 Commission Regulation (the scope of which was extended in 2021)[39] lists several categories of aid, including aid to support green and digital transition, aid for research and development and innovation, support for training of workers, and aid for disadvantaged workers and for workers with disabilities.

This general block exemption Regulation ("GBER") is an important instrument. According to the Commission, between 2015 and 2021 more than 96% of new state aid measures for which expenditure was reported for the first time did not require prior notification[40].

The measures falling within the scope of the GBER can be implemented by Member States without the need to notify the Commission. Regulation is therefore a major simplification, which enables a quicker implementation of state aid.

The GBER sets criteria for eligibility, having regard to beneficiaries, maximum eligible costs, aid amounts and eligible expenses.

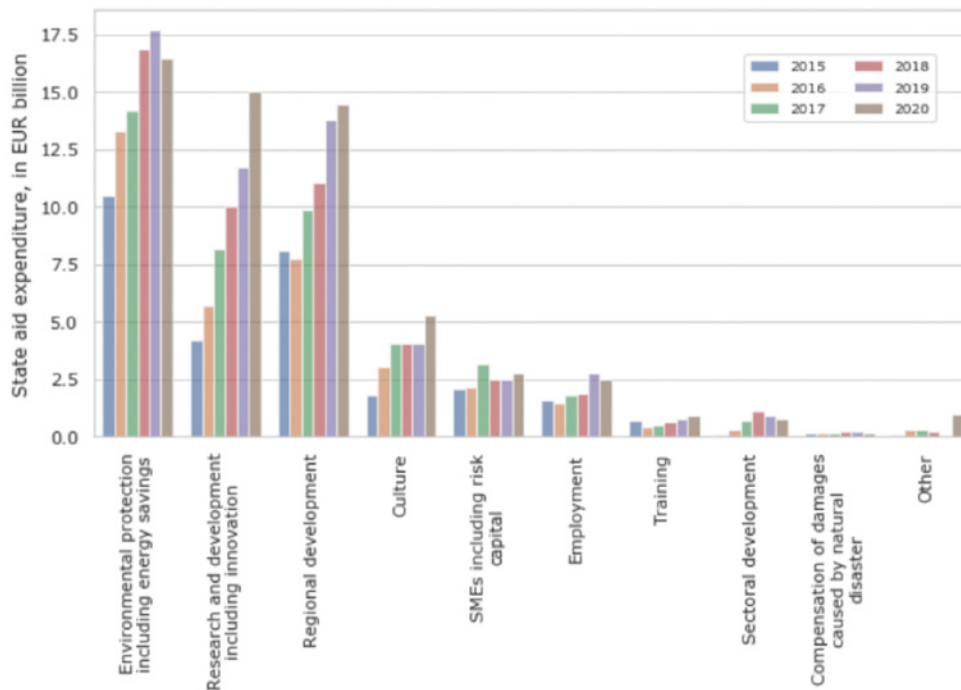
As observed in previous Scoreboards, the Member States are increasingly using block-exempted measures since state aid modernisation. Member States reported to have provided aid under 4,376 GBER measures in 2020, representing 63% of all the active measures against 41% in 2014.

38 Regulation 2015/1588 of 13.07.2015

39 Commission 651/2014, as amended by Regulation 2021/1237, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty

40 State aid (europa.eu)

Figure 18 GBER State aid expenditur by policy objective in EU, 2015-2020



4.5 OVERVIEW OF TOTAL STATE AID EXPENDITURE IN THE EU 27

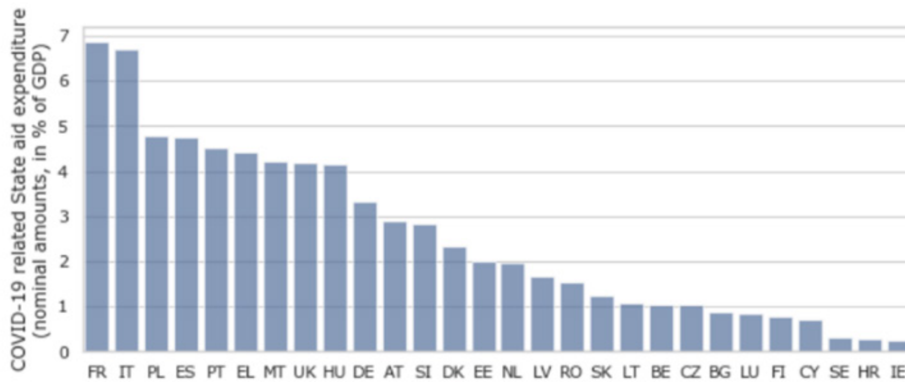
In spite of the prohibition of principle, and as a consequence of a substantial body of exemptions, the volume of state aid in the EU is significant. The total state aid expenditure has continued to increase since 2019. This trend exists independently from the severe disruptions in the EU economy resulting from the pandemic and the energy crisis.

State aid for COVID-19 measures

In 2020, the total expenditure for COVID-19 measures amounted to EUR 227.97 billion, covering around 59% of total state aid spending. That year, although COVID-19 measures represented a minority of all active measures, they mobilised unprecedented levels of support (European Commission, 2022).

In relative terms, France is the country that has provided the most aid to the economy compared to its own GDP in 2020 (6.9%), followed by Italy (6.7%), Poland (6.0%), Spain (4.39%), Portugal (3.9%), Greece (3.7%), Malta (3.6%), the United Kingdom (3.6%) and Hungary (3.5%). Germany provided a lower relative amount of COVID-19 nominal aid, corresponding to 3.3% of its 2020 national GDP. In absolute terms, Germany as a large Member State is the biggest attributer of state aid.

Figure 19 Total state aid expenditure for COVID-19 measures by Member State (nominal amounts, as a percentage of 2020 GDP)



Source: (European Commission, 2022)

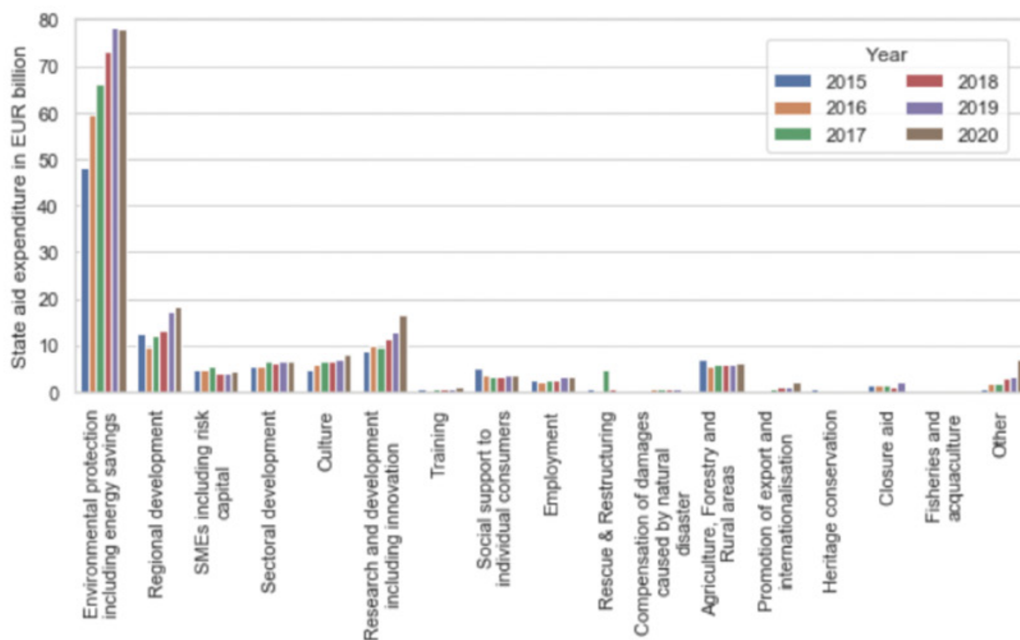
State aid for non-COVID-19 measures

State aid expenditure for non-crisis objectives does not show any abrupt breakup in the year of the pandemic. According to the 2021 State aid Scoreboard, the EU 27 and the United Kingdom spent EUR 156.36 billion on state aid for non-COVID-19 measures in 2020, excluding aid to railways. This corresponds to 0.99% of total 2020 GDP, covering around 41% of the total spending.

This represents an increase of 9.12 billion since 2019.

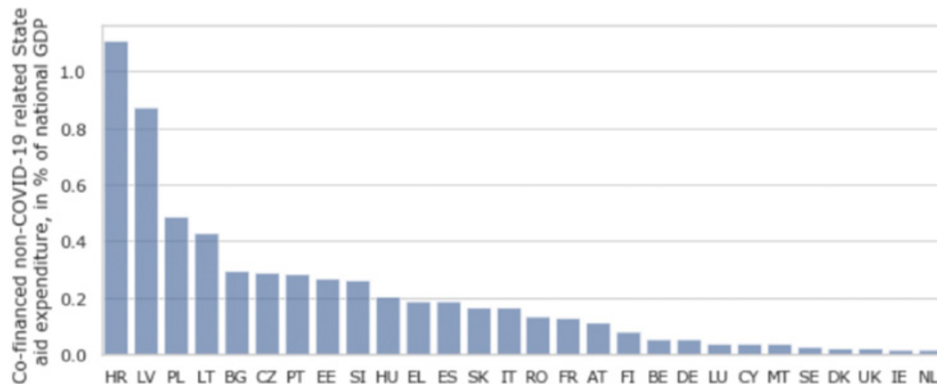
Environmental protection and energy savings is by far the policy objective for which Member States spend the most. The amount of state aid for green objectives is around five times larger than the cumulative total expenditure under the second most subsidised objective, regional development. The third objective is research and development including innovation. These three prime objectives at EU level account for 71% of overall expenditure at EU level.

Figure 20 Total state aid expenditure, excluding aid to railways, by policy objective in 2020



The Member States spending the most spend around 4.2-4.8% of their national GDP (Malta, Poland and Greece), while the Member State spending the least spends around 0.6% of GDP (Ireland), followed by Luxembourg, the Netherlands, Sweden and Cyprus, with around 0.6-1.2% of their national GDP.

Figure 21: state aid expenditure for non-COVID-19 state aid co-financed projects in 2020, in percentage of GDP



Source: (European Commission, 2022)

5. The employment dimension of state aid rules

5.1 LACK OF SOCIAL CONDITIONALITY

The safeguarding of jobs does not appear among the EU criteria to exempt crisis measures from state aid rules.

As a result of the COVID-19 lockdowns, all EU governments have implemented state support for companies at an unprecedented level in order to avoid widespread economic dismissals. Yet, the temporary framework does not contain checks and balances to ensure that the financial aid was indeed used to that effect.

During the pandemic, individual Member States took the initiative of introducing some temporary requirements, mostly in two areas: restrictions to economic dismissals for firms receiving employment subsidies, and financial activities such as payments to shareholders and refinancing of existing debts.

However, the scope, the design and therefore the impact of these policies vary significantly from one Member State to another. Furthermore, social dialogue and longer-term responsible business conduct are left out of political agendas. According to trade union reports, the pandemic has been used as an excuse by opportunistic employers to benefit from state support whilst at the same time cutting down on labour costs for reasons not linked to the lockdowns. In some cases, the strategy was to re-hire staff on inferior working conditions or through subcontracting at a later stage. An overall degradation of working conditions and a freeze in wage levels have been widely reported.

Similar issues are now likely to arise in the context of the current temporary crisis framework.

5.2 RESTRUCTURING AND EMPLOYMENT

As described in the above section 0, an important element of the economic test to clear state aid is to ensure that companies considered "inefficient" are not artificially maintained on the market. State support must therefore be accompanied by detailed restructuring plans to save on costs, as well as proposals to divest from insufficiently profitable activities.

Restructuring plans have a direct and substantial impact on employment levels, work organisation and collective bargaining, to the extent that employees may be asked to consent to sacrifices in exchange for the safeguarding of their jobs. In spite of this, the 2014 Guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty[41] do not foresee the formal involvement of trade unions in the drawing up of the restructuring proposal nor in the exchanges with the EU competition authorities. This lack of involvement is even more striking considering that a commonly admitted objective for clearing state aid in support of companies in difficulty is the safeguarding of jobs.

Box 4 State aid in aviation – social plans at KLM, 2020

KLM is one of the four largest airline companies in the Netherlands, in 2019 employing 38,000 employees and 10,000 cabin crew. In 2020, KLM received two major state aid measures from the Dutch government, in the form of direct state aid and a loan of 3.4 billion.

Before the implementation of the grant, the Dutch government consulted the unions, who demanded that KLM maintain employment and salary payments.

In contrast, the terms of the loan were mostly agreed between the government and KLM. These terms included a commitment to reduce all costs that could be influenced by 15%. Employees were expected to consent to a salary sacrifice ranging between 6 and 14% of wages. The details were to be further discussed by the company and the unions.

Once the principle of the social plan was agreed between KLM and the government, unions were asked to validate the agreement within a 24-hour deadline. According to a union representative, the unions felt they were taken hostage with no room for collective negotiations.

Subsequently, the FNV filed a complaint to the International Labour Organisation ("ILO"), arguing that the conditions for the state aid constituted a violation of the right to collective bargaining. As a result of this complaint, the ILO made the following recommendation to the Dutch government:

The Committee encourages the Government to engage in dialogue with the employers' and workers' organizations concerned with a view to ensuring that the duration and the impact of the above-mentioned measures are strictly limited to the exceptional circumstances faced and to ensure the full use of collective bargaining as a means of achieving balanced and sustainable solutions in times of crisis (ILO Governing Body, 2022).

5.3 SOCIAL FRAUD

Poor enforcement of EU labour rules is not considered illegal state aid.

A Member State that facilitates social fraud through poor enforcement of EU labour rules (e.g. letterbox companies, fake posting and non-payment of social security contributions) is arguably granting undue competitive advantage to its companies. However, the facilitation of social fraud is not currently captured by state aid rules.

In other areas, facilitating avoidance of financial obligations, through for instance lenient tax rules, can be treated as illegal state aid.

41 See above note 37

Box 5 Preferential treatment of employers posting workers – the Austrian experience

In 2019, the Austrian construction union Gewerkschaft Bau-Holz brought to the attention of the European Commission a case of preferential treatment by the Slovenian authorities towards their own service providers when posting workers in other Member States.

Under EU law, a worker posted to another Member State within the terms of the posted workers Directive 96/71 (as modified by Directive 2018/857) is guaranteed equal remuneration in line with host country standards during the time of posting.

During that temporary assignment, social security contributions continue to be governed by the law of the employer's establishment.

Social security contributions are calculated on the basis of the gross wages. Under Slovenian law, the reference wage during posting continues to be the Slovenian wage and not the wage actually paid during that time. The difference can be quite significant. In Austria the minimum monthly salary in 2022 amounted to EUR 1,942.47, almost double the Slovenian minimum wage, which amounted to EUR 1,024.24.

The Austrian unions consider that the Slovenian legislation distorts competition in the single market. Slovenian service providers indeed incur lower labour costs than Austrian employers.

Slovenian legislation also gives a selective advantage to companies posting employees abroad compared to companies carrying out domestic projects.

At the time of writing this report, the Austrian unions have not received a formal response to their complaint.

TITLE V.
State aid,
public ownership
and services
of general interest

KEY MESSAGES

This Title reviews the complex framework applicable to the financing of public service obligations carried out by private companies.

The EU Treaties are meant to be neutral on the question of public or private ownership. They offer the possibility of striking a balance between, on the one hand, free-market principles applicable to economic activities and, on the other hand, the recognition that services of general interest need to be protected with a view to guaranteeing universal and affordable access to essential services.

EU competition authorities have tilted this balance towards a "market efficiency" approach. Public control, in the form of state ownership and/or exclusive or special rights, and increasingly also public regulation, is assessed very restrictively and on the basis of economic tests. With regard to public subsidies, the complexity of the state aid rules has proved cumbersome for local authorities.

The financing of public service obligations is not considered state aid. The Commission intervenes to control whether any over-compensation has been paid to companies (which would give an unfair advantage). The EU Commission applies some flexibility in state aid rules for local and social services through the introduction of de minimis rules and a simplification of the notification process. They have also encouraged, however, the use of greater public procurement (to "prove" that no overcompensation has been paid), which has caused problems.

The challenges raised by the outsourcing of public services include job losses and adverse impact on the universality and quality of essential services, with a disproportionate effect on those living in poverty and on a lower income. Further challenges are raised by the EU liberalisation of certain sectors, brought to the forefront by the pandemic, the cost of living and the energy crises.

1. The principle – a special regime for services of general economic interest

Art. 345 TFEU stipulates that the Treaties do not *prejudice the rules in Member States governing the system of property ownership*. In simpler terms, all forms of public ownership are permissible under EU law. Recent renationalisation of strategic companies with a view to preventing their failure in a context of deep economic disturbance are, as a matter of principle, perfectly compatible with EU law[42].

Competition policies will look not at the ownership of public companies but at their behaviours on the market, as well as sources of financing, with a view to ensuring that public ownership does not lead to a distortion of competition in the internal market. Article 106.1 lays down the clear principle that EU competition rules fully apply to public companies or companies to which the State has granted special or exclusive rights. As we will see in the following section 3, the rules on abuse of dominant position and state aid are strictly applied.

That said, public companies fulfilling a public service mission may be exempted from competition rules. Article 106.2 introduces the principle that companies entrusted with the operation of services of general economic interest ("SGEI") can escape the application of competition rules to the extent that these rules would obstruct the performance, in law or in fact, of the particular tasks assigned to them.

42 See for instance the French government announcement of the takeover of energy company EDF: L'État a enclenché le processus de renationalisation d'EDF – Le Point

As described in the previous Titles of this report, one of the principles of EU competition law is that an undistorted market is not only of fundamental importance to the achievement of the internal market – removing barriers to trade – but is also generally perceived as fulfilling a "social function": less efficient entities in terms of productivity, pricing and innovation are driven out. The rationale is that a free market is better for consumers, leads to more productivity and thereby more jobs.

At the same time, the EU Treaties recognise that a certain amount of market distortion may be required to ensure that public service missions are protected from market failure. When it is considered that the market does not generate sufficient incentives, a shield from competition rules is provided to promote social and territorial cohesion and to guarantee universal access to fundamental services. Furthermore, users of public services cannot be equated with enlightened consumers able to make a rational choice. Access to public services is not linked to the ability to pay.

Furthermore, in certain sectors such as health, it is the supplier who is better placed to determine the demand.

Therefore, the solidarity principle which is the "raison d'être" of public services implies that risks inherent to free competition are partly or entirely neutralised. A public authority may deem it necessary to grant privileged status to the entity fulfilling a public service mission, protecting it from market failure.

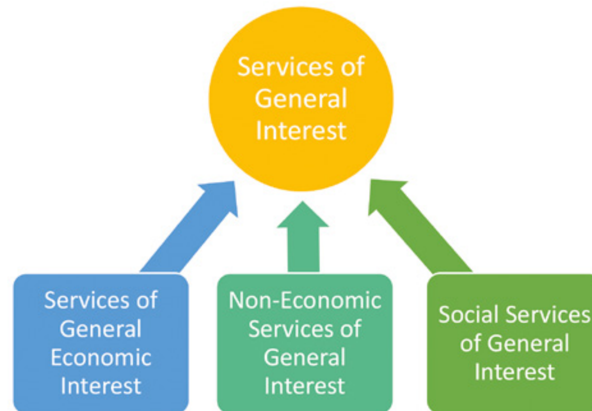
This is recognised by Art. 14 TFEU, which defines SGEI as shared values of the Union, emphasises their role in promoting social and territorial cohesion, and declares a shared competence between the EU and the Member States, each within their respective powers, in order to take care that providers of SGEIs operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions.

In addition, annexed to the Lisbon Treaty is a Protocol 26 on services of general interest, with the same legal value as the Treaty, which recognises the essential role and the wide discretion of public authorities at all levels, the diversity between various SGEI, and the characteristics of SGEI such as a high level of quality, safety and affordability, and universal access. The Protocol further stresses that the EU Treaties should not affect national competences to ensure the functioning of these services.

Thus, the EU legal framework applicable to public services seeks to strike a balance between, on the one hand, the wish to maintain a free and undistorted market and, on the other hand, the recognition that state intervention is indispensable to address market failures. The exercise is further complicated by the fact that the very understanding of public services varies greatly from one Member State to another, with national choices deeply anchored in historic, cultural and economic choices.

2. In or out of competition law? Services targeted by Art. 106

Figure 22 The concept of services of general interest



The term "public services" is not used in the EU Treaties, which instead refer to "services of general interest". The concept, however, is not defined and clarifications must be found in case law and other EU instruments.

The EU Commission states in a 2011 Communication that services of general interest are services that public authorities of the Member States at national, regional or local level classify as being of general interest and, therefore, subject to specific public service obligations[43,44]. The term "services of general interest" covers both economic activities and non-economic services. The EU Commission identifies "social services of general interest" as an additional category of services of general interest.

Thus, a public service mission may fall into one of the three following categories:

- Non-economic services, excluded from EU competition law;
- Services of general economic interest, partially covered by EU competition law;
- Social services of general interest, which may fall into one of the above categories.

Public authorities at national, regional or local level have wide discretion to define what they regard as services of general interest. However, EU law will control whether there has been a manifest error of assessment in the identification of general interest.

2.1 NON-ECONOMIC SERVICES – EXCLUSION FROM EU COMPETITION LAW

EU competition law targets behaviours by companies. An entity which does not constitute an "undertaking" within the meaning of Art. 106 will fall outside the scope of EU competition law. In this regard, Protocol 26 on services of general interest recalls that the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

43 Communication of 20.12.2011, *A Quality Framework for Services of General Interest in Europe*, COM (2011) 900 final

44 Staff Working Document of 20.04.2013, Guide to the application of the European union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SWD (2013) 53 final/2

As the Treaty does not define the concept of "undertaking", interpretation is left to the European judge. For the European Court, the concept of undertaking covers *any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed*[45]. In one case, a public employment agency which was granted by law exclusive rights for employment procurement was considered an undertaking.

On the other hand, entities which exclusively pursue a social objective and do not engage in an economic activity do not constitute undertakings. As an illustration, the Court found that a body involved in the management of a public social security system is not to be considered an undertaking if it fulfils an exclusive social function, performs an activity based on the principle of national solidarity and is entirely non-profit making[46].

Other non-economic services would include any activity that forms part of the essential functions of the state or are closely connected to activities such as the police, justice and statutory social security schemes, and air navigation safety and control. In contrast, services considered to be economic include, depending on the specific circumstances, for instance:

- optional insurance schemes operating according to the principle of capitalisation[47];
- emergency and patient transport services[48];
- management of transport infrastructure[49].

2.2 SERVICES OF GENERAL ECONOMIC INTEREST – A PARTIAL APPLICATION OF COMPETITION RULES

Services of general economic interest ("SGEI") are in principle covered by EU competition rules due to their economic nature. As we will describe in section 3, some derogations are possible to the extent that this is necessary to the fulfilment of the public service objectives they pursue.

The EU Commission has clarified in its Quality Framework[50] that *SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention*.

Two elements allow the identification of SGEIs. First, it must be established that the public authority has entrusted the entity with a public service mission. The act of entrustment needs to be an official act carrying legal force in national law but does not have to be in any particular form.

Second, the mission entrusted to the entity must present characteristics of general interest. There are no criteria in EU law defining what constitutes or not general interest. Public authorities therefore enjoy a wide margin of discretion. There are, however, some limits to that discretion. EU competition authorities assess manifest error of appreciation, taking into consideration that SGEIs must exhibit special characteristics as compared to other economic activities[51]. These characteristics are assessed on a case-by-case basis.

45 C-41/90 Höfner
46 C-159/91 and C-160/91 Poucet Pistre
47 C-244/94 FFSA
48 C-475/99 Glöckner
49 C-82/01 Aéroports de Paris vs Commission
50 See above note 43
51 C-179/90 Merci
52 C-66/86 Ahmed Saeed

Examples of general interest include:

- Airlines which operate routes that are not commercially viable to operate in the general interest[52];
- Postal services consisting in the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs and under similar quality conditions[53];
- Regional electricity distributors[54];
- Mooring operations: mooring groups are obliged to provide at any time and to any user a universal mooring service, for reasons of safety, in port waters[55];
- Ambulances with an obligation to provide a permanent standby service of transporting sick or injured persons in emergencies throughout the territory, at uniform rates and under similar quality conditions[56];
- A supplementary pension scheme[57].

2.3 SOCIAL SERVICES OF GENERAL INTEREST – A MIXED CATEGORY

The concept of social services of general interest does not appear in the EU Treaties and has not so far been addressed in the case law of the European Court of Justice. The term made a first appearance in 2007 in a Commission Communication, *Services of general interest, including social services of general interest: a new European commitment*[58].

Social services of general interest include social security schemes and other services provided directly to persons in need of support, care, training, counselling or empowerment. The Commission makes it clear that these services can cover both economic and non-economic activities. Thus, services considered social do not escape in principle the application of competition rules.

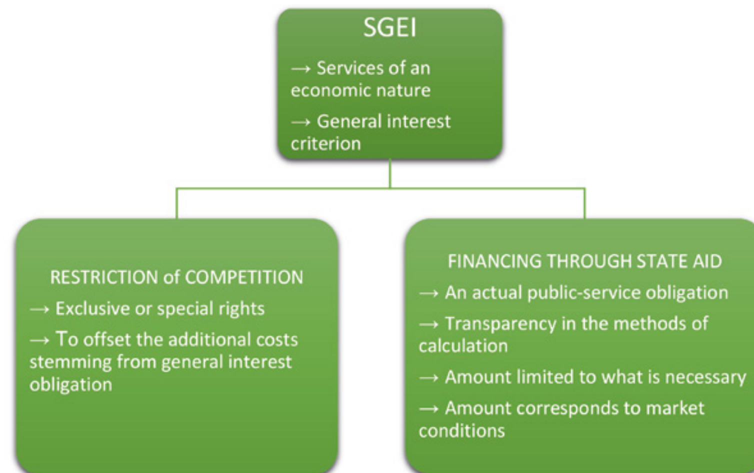
From that perspective, it is unclear whether distinguishing social services from other services of general interest generates any legal consequences. Politically, however, the Commission's documents can be considered a recognition that these services play a socially cohesive role, that they contribute to a high level of employment, social inclusion and economic growth.

3. A push to privatisation? Rights and obligations of public authorities

Public control, in the form of state ownership and/or exclusive or special rights is assessed very restrictively and on the basis of economic tests. A substantial number of obligations apply in relation to SGEIs, specifying to what extent Member States can shield a service from market competition and laying down detailed rules for the control of financial compensation.

53 C-320/91 Corbeau
54 C-393/92 Almelo
55 C-266/96 Corsica Ferries
56 C-475/99 Ambulanz Glöckner
57 C-67/96 Albany
58 Communication of 20.11.2007 COM (2007)725 final

Figure 23 Overview of Member States' rights and obligations in relation to SGEIs



3.1 IS PUBLIC CONTROL ALLOWED UNDER EU LAW?

A restrictive approach to exclusive and special rights

As a general rule, state-owned or state-controlled companies are authorised by the EU Treaties (Art. 345). It is also recognised that public ownership can entail a restriction of competition in the form of special or exclusive rights (Art. 106.1). These rights presuppose the existence of an authorisation regime, whereby the public authority selects a limited number of companies which can provide the service in a given sector/ geographical zone. In the case of exclusive rights, the existence of competitors is ruled out.

However, considering the strong potential for distortion of competition, Art. 106.1 also makes it clear that there is no immunity from competition rules for companies to which Member States grant special or exclusive rights. This fits with the general spirit of the Treaties. If the state was able to give unjustified preferential treatment to selected firms, barriers to trade would be erected and the very idea of a level playing field would be undermined. An entity benefiting from exclusive or special rights may therefore be found in breach of Article 102, which prohibits abuses of dominant position (see the description of applicable rules in the above Title III)Abuse of dominant position.

The competition rules apply very strictly to public ownership. The EU Court has ruled that there is a breach of competition rules whenever granting special or exclusive rights is liable to create a situation in which the company is induced to commit an abuse. The reasoning of the Court may be likened to a hidden prohibition of exclusive rights/monopolies per se. Arguably, any position of market power enables abusive pricing or other unfair trading conditions regardless of whether or not the company chooses to do so.

Examples of abuses include:

- Unfair pricing

In the Bodson case the Court held that public authorities may not assist undertakings holding exclusive concessions – in this case for the provision of funeral services – to charge unfair prices by imposing such prices as a condition for concluding a contract for a concession[59].

- Inability to satisfy market demand

59 Bodson C-30/87

In Höfner[60], a public employment agency had been granted the monopoly of employment procurement for business executives. The Court ruled that a Member State which has conferred upon a public employment agency an exclusive right to carry on that activity is in breach of Article 106.1 where it creates a situation in which that agency cannot avoid infringing Article 102. That is the case, in particular, where the public employment agency is not in a position to satisfy market demand and private recruitment consultants are not allowed to pursue those activities.

- Unfair trading practices, limited technical development to the prejudice of consumers

In Merci[61], shipping companies had to apply for unloading services from the firm enjoying exclusive rights to organise dock work in the port of Genoa. These applications had to be made even if the ships' own crews could perform the task themselves. The Court considered that the undertaking enjoying exclusive rights was induced to demand payment for services which have not been requested, to charge disproportionate prices, to refuse to have recourse to modern technology – which involves an increase in the cost of the operations and a prolongation of the time required for their performance – or to grant price reductions to certain consumers and at the same time to offset such reductions by an increase in the charges to other consumers. Article 102 had therefore been violated.

Derogations for missions of general interest

Almost inevitably, a company enjoying special or exclusive rights will be in breach of competition rules and will have to demonstrate that it performs a mission of general interest within the meaning of Art. 106.2. We have already explained that public authorities enjoy a margin of discretion in deciding what constitute such a mission. However, EU competition authorities have a long practice of reviewing manifest errors of appreciation.

Once the existence of a mission of general interest has been established, competition law principles do not apply if it can be shown that without a restriction of competition it would not be possible for the holder of the general interest mission to perform its tasks under economically acceptable conditions. Universal-service obligations require the performance of tasks which are not profitable.

In order to ensure overall economic equilibrium, and thus viability of the service, it is necessary to impose a restriction of competition on the more profitable activities.

In the landmark case Albany[62], affiliation to a supplementary pension scheme had been made compulsory by Dutch law. The Court considered that the removal of the exclusive right conferred on the supplementary pension scheme might make it impossible for it to perform the tasks of general economic interest entrusted to it under economically acceptable conditions and threaten its financial equilibrium. If the exclusive right of the fund to manage the supplementary pension scheme for all workers in a given sector was removed, undertakings with young employees in good health engaged in non-dangerous activities would seek more advantageous insurance terms from private insurers. The progressive departure of "good" risks would leave the sectoral pension fund with responsibility for an increasing share of "bad" risks, thereby increasing the cost of pensions for workers, particularly those in small and medium-sized undertakings with older employees engaged in dangerous activities, to which the fund could no longer offer pensions at an acceptable cost. Such constraints, which render the service provided by the fund less competitive than a comparable service provided by insurance companies, go towards justifying the exclusive right of the fund to manage the supplementary pension scheme.

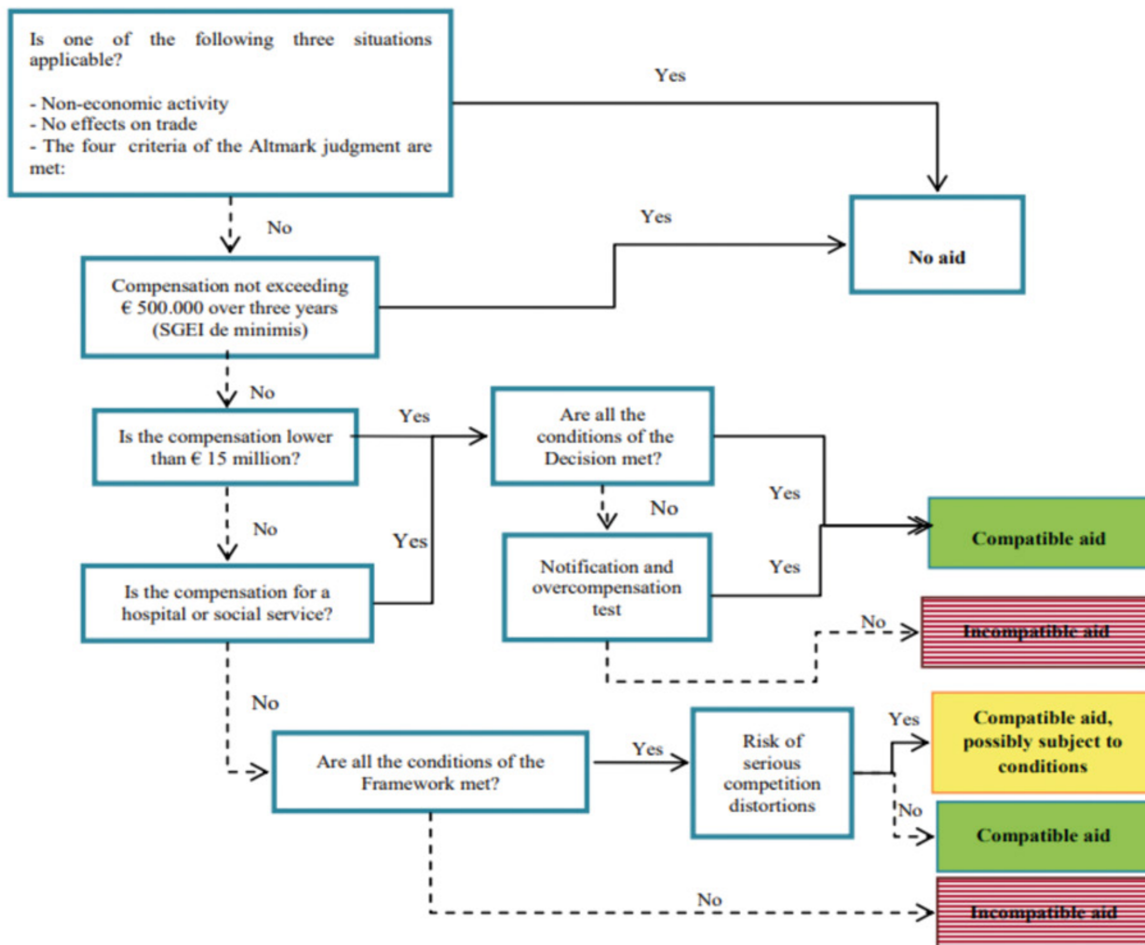
60 Höfner C-41/90
61 Merci C-179/90
62 Albany C-67/96

Another illustration is provided in the FFAD case, where the Court ruled that a local authority could impose exclusive rights for the processing of non-hazardous building waste, taking into consideration the environmental problem resulting from insufficient processing capacity[63].

Art. 106.2 does not entail an exclusion of competition altogether. The Court rules that restriction of competition is not justified if the services concerned are dissociable from the SGEI and they could be offered by other companies without compromising the economic equilibrium of the SGEI performed by the holder of the exclusive right[64].

3.2 RULES GOVERNING THE FINANCING OF SGEIS

Figure 24 Steps for the analysis of a public service compensation



(Source: European Commission[65])

Overview: the Altmark criteria

Public subsidies for the financing of SGEI may be exempted from state aid rules. In the Altmark judgment[66], the Court ruled that four criteria need to be fulfilled for a public subsidy to escape the prohibition of state aid.

The first condition, which we have already described above, is the existence of actual public service obligations to discharge. The obligations must be clearly defined.

63 FFAD C-209/98
64 Corbeau C-320/19
65 Staff Working Document, see above note 44
66 Altmark C-280/00

Second, the parameters for the calculation of the compensation must be established in advance, in an objective and transparent manner.
Third, the amount of the compensation does not exceed what is necessary to cover the costs incurred in the discharge of the public service obligation.

Fourth, where the undertaking pursuing the public service obligation is not chosen by a public procurement procedure, the level of compensation should be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.

This last requirement is difficult to fulfil in practice.

The assessment – the State Aid SGEI package

In 2012, the EU Commission adopted a State Aid SGEI package specifying in greater detail the requirements to meet the Altmark conditions. The package consists in four documents.

A Communication recapitulates key concepts and definitions, such as the notion of aid, general interest and what may constitute a service of an economic nature[67].

A de minimis Regulation establishes a threshold below which compensation is deemed no to be aid[68].

Public funding of SGEIs not exceeding EUR 500,000, granted over any period of three fiscal years, is not considered state aid. This is because the amount is so small that it can be deemed not to have an impact on cross-border trade or competition. Since the measures are not considered state aid, there is no obligation to notify the Commission of them in advance[69].

A Decision exempts Member States from the obligation to notify certain public service compensations to the Commission[70]. The following public service compensations may, if they fulfil certain conditions, be exempt from a notification obligation:

- Compensation not exceeding EUR 15 million on an annual basis (except for transport);
- Compensation granted to hospitals providing medical care;
- Compensation granted to health and long-term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups;
- Compensation for certain strictly defined air or maritime links and for airports and ports.

Member States may be exempted from the obligation to notify the Commission of these compensations if the two following conditions are fulfilled.

First, public authorities have established an act of entrustment giving clear information on the nature and characteristics of the public service obligation as well as the parameters for the calculation, the control and the review of the compensation. The act of entrustment also contains arrangements for avoiding and repaying any overcompensation.

Second, the compensation does not exceed what is necessary to cover the costs incurred in discharging the public service obligations.

Third, public authorities have put in place controls to prevent overcompensation.

67 Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.01.2012).

68 Commission Regulation of 20.12.2011 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ C 8, 11.01.2012, p. 23-27).

69 Question 16 of the Commission Staff Working Document cited above in note 44

70 Commission Decision of 20.12.2011 (OJ L 7, 11.01.2012, p. 3-10)

In the view of the Commission, the Decision sensibly differs from the Altmark case law in that it does not set efficiency requirements. Whilst the Court would require assessing an adequate level of compensation by comparison to an efficient undertaking, the Decision is satisfied that the compensation granted corresponds to the net costs. In that sense, the Commission's practices seek to address concerns that market forces are not entirely appropriate to assess public service obligations.

Finally, a Framework specifies the conditions under which a public service compensation that the Commission has to be notified of can be deemed compatible with the EU rules[71]. In line with the Altmark judgment, the conditions can be summarised as follows:

- Transparency;
- Compliance with EU public procurement rules;
- Absence of discrimination;
- Overcompensation test;
- Efficiency incentives;
- Possible additional requirements for particularly distortive aid.

4. Liberalisation – breaking up of state monopolies through secondary legislation

Art. 106.3 entrusts the Commission with the task of ensuring the application of this Article, where necessary through delegated acts. This is an important provision, interpreted widely by the Court. The European judge has considered that Art. 106.3 also entails the possibility for the Commission to abolish exclusive or special rights to ensure that competition is not distorted and to secure equality of opportunity between economic operators[72].

In the late 1980s and early 1990s, the Commission used this prerogative to oblige Member States to abolish exclusive rights for telecommunications terminal equipment[73] and to open up telecommunications services to market competition[74]. Throughout the 1990s, the EU institutions also adopted legislation to frame certain public service obligations and to open to competition sectors which until then were state owned in several Member States.

A third Postal Directive opened to competition all postal services. It also contains provisions relating to the maintenance of a universal service, requiring that letter and parcels are delivered on five days each week, throughout each EU country[75].

In transport, the last 25 years have seen significant restructuring in the European rail transport market. The Commission's efforts have concentrated on three major areas: (1) opening the rail transport market to competition, (2) improving the interoperability and safety of national networks and (3) developing rail transport infrastructure. A first railway package was adopted in 2001 aiming at opening up access to networks on a non-discriminatory basis.

71 Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011) (OJ C 8, 11.01.2012, p. 15-22).

72 France vs Commission C-202/88

73 Commission Directive 88/301 of 16.05.1988 on competition in the markets in telecommunications terminal equipment

74 Commission Directive 90/388 of 28.06.1990 on competition in the markets for telecommunications services. This Directive has been followed by a series of Commission instruments on satellite, cable TV and mobile communications

75 Directive 2008/6/EC of the European Parliament and of the Council of 20.02.2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services

A second railway package opened freight market to competition from 2007. The third package sought to open up international passenger transport by 2010. The fourth package adopted in 2016 contains a number of technical measures, including measures to facilitate market opening for domestic rail passenger services[76].

In the same vein, four energy packages were adopted between 2006 and 2019[77]. The electricity and gas markets have been opened to free competition. The liberalisation has been accompanied by mandatory unbundling, i.e. the separation of energy supply and generation on the one hand and, on the other hand, the operation of transmission networks. This is to prevent companies operating the network from obstructing competitors' access to indispensable infrastructure.

A fifth energy package is currently under discussion in a context of European climate ambitions and the energy crisis caused by Russia's invasion of Ukraine[78].

5. The sustainability impact of privatisation and liberalisation

While the Treaties offer a basis for the recognition of public service obligations, a preference has been expressed by EU institutions for these obligations to be delivered by private actors in the context of competition that is as free as possible. Thus, EU competition authorities apply market efficiency tests. In the case of a restriction of competition, the efficiency and the adequacy of the public authority's decision are measured against economic criteria, taking into account market demands and a calculation of costs by comparison to a private undertaking.

The application of a market efficiency test is paradoxical given that state intervention in specific cases is precisely designed to compensate for market failure to provide essential services on a universal and affordable basis.

In parallel, the rules have an inhibiting effect on local authorities due to their complexity and unpredictability. As illustrated by the length of EU Commission guidance on the application of competition principles to SGEIs[79], the rules are very complex and detailed. Furthermore, in the absence of clearly defined public service obligations at European level, the assessment of SGEIs is done by the Court on a case-by-case basis. Given the wide diversity of public services in the Member States, the outcome of EU competition tests can thus be considered unpredictable. In particular, state aid rules can dissuade smaller local authorities from significantly investing in public service missions for fear of legal consequences.

The market efficiency test has fed into the privatisation of public services across the EU, with private firms taking over services previously provided by the state. In parallel, the liberalising agenda conducted through secondary legislation has broken up state-owned monopolies.

Trade unions have long opposed the outsourcing of public services to the (profit-making) private sector, expressing concerns about adverse impact on their universality, quality and employment[80].

76 The texts of the four packages can be found on the European Commission website: Railway packages (europa.eu)

77 References to the energy packages can be found on the European Commission website: Market legislation (europa.eu)

78 Fit for 55 – The EU's plan for a green transition – Consilium (europa.eu)

79 See above note 44

80 See for instance EPSU positions www.epsu.org

These concerns have been echoed in a 2018 report by the UN Special Rapporteur on extreme poverty and human rights. The report defines privatisation as a*ny private sector involvement in public service provision* and describes how those living in poverty or on low incomes are negatively affected by it. Among other concerns, the UN Rapporteur deplores that *truckloads of guidelines* [to ensure that public-private partnerships achieve desired objectives] *have already been adopted, and most ignore human rights in any comprehensive sense and pay scant regard to the negative outcomes that privatisation can have in terms of poverty and inequality* (UN Special Rapporteur , 2018).

Similarly, liberalisation of certain state-owned services does not appear to always translate into benefits for users. In some cases, state monopolies have been replaced with large privately owned company groups. As illustrated by the following Box 6 Assessing the impact of energy liberalisation, this feeds into increasing corporate concentration and rent-seeking behaviours where firms accumulate wealth rather than reinvest it. This leads to increased markups, and short-term business strategies. Further, company ownership can change quite fast, bringing more risks to employment and the quality of the service.

Importantly for unions, privatisation has a significant impact on employment. Private investors expect satisfactory returns on investment, often in the short-term. This leads to cutting labour costs, leading to precarious employment and job losses. Studies also evidence adverse impact on unionisation and collective bargaining coverage (Keune, 2020).

Box 6 Assessing the impact of energy liberalisation

A report commissioned in 2019 by the European Public Service Union analysed the impact of energy liberalisation (Weghmann, 2019). Liberalisation has led to a further concentration of ownership, with small operators and retailers being taken over by five major pan-European energy companies. As a result of energy liberalisation and privatisation, prices in electricity and gas have increased for consumers and energy poverty across Europe doubled over a 10-year period (this report is based on findings prior to the 2022 energy crisis).

The report further demonstrates that renewables can only thrive where state aid rules are suspended.

In terms of employment, a quarter of jobs have been lost in the energy sector in the past decade.

Liberalisation has also shifted the nature of work, with a general decline in technical and maintenance jobs often facilitated by outsourcing. Meanwhile, the number of legal, marketing and sales staff has increased, with companies prioritising winning customers in a liberalised market.

TITLE VI.
Policy recommendations

KEY MESSAGES

This Title puts forward policy and strategic recommendations to address the concern that current competition policies insufficiently take into account impact on employment.

Some changes are possible in the short term within the current frame of EU competition policies. Such changes involve the active involvement of trade unions in current proceedings, with a view to pushing for a reinterpretation or a suspension of some competition principles when they might have an adverse impact on employment.

As regards services of general interest, the impact of liberalisation and outsourcing of services in terms of efficiency, quality and employment needs to be better assessed.

In the longer term, legal changes in competition frameworks should also be envisaged so that competition authorities are better equipped to actively integrate sustainability in their assessment.

1. Opportunities under existing frameworks / seeking complementarities

1.1 THE NEED FOR A COORDINATED TRADE UNION STRATEGY

A first recommendation is for trade unions to increase their influence over current competition outcomes through regular interventions in the course of antitrust, merger control and state aid proceedings. Our exchanges with Commission representatives in the course of this project suggest that the Commission's services have a positive attitude towards an increased engagement of trade unions and workers' representatives.

Increased union involvement can be a win-win situation. From the point of view of Commission officials, trade unions can bring much needed information to ongoing investigations thanks to their unique insight into the functioning of the company, its business model and the sector in which it operates. From a trade union perspective, the objective of these interventions would be to increase the understanding (by the competition authorities as well as by trade unions) of the impact of corporate power on employment, and to bring more visibility to a trade union agenda in this regard.

Trade unions will also be able to get invaluable insight into a given operation, for instance a planned concentration. Whilst third-party intervention by trade unions may imply time and resources, itbears no legal risk as the interested party is not the formal addressee of the competition proceeding.

A coordination of union interventions at national, sectoral and European levels would be desirable with a view to identifying cases that can help towards the overall advancement of trade union goals.

A trade union strategy may in particular combine the following elements:

- An offensive approach, where unions would provoke winnable cases through complaints to the EU Commission.

Low-hanging fruit could include cases of employers colluding, seeking to prevent job mobility and keep wages down. The EU Commission appears to be increasingly willing to investigate such practices in the short-term.

- A defensive approach, where unions would seek to prevent or mitigate risks to workers in o going competition investigations.

Merger controls in particular present potentially significant impact on employment. Due to their narrow focus on markets and consumer welfare, current control merger practices have so far offered limited opportunities to take on board workers' concerns. The goal of a proactive strategy in mergers control would therefore be to bring visibility to and increase the understanding of the trade union agenda with a view to advancing longer-term demands. Overall, trade unions will be looking to have a stronger say in the case of planned concentration, through information and consultation rights granted both by the merging companies and the competition authorities.

Trade union coordination in merger control appears highly desirable, especially for mergers or acquisitions that entail transfers of jobs from one Member State to another.

- A prioritisation of cases, taking into consideration broader economic circumstances.

In particular, the ability of public authorities to provide subsidies in a context of deep economic disturbance appears very topical at the time of writing this report.

Possible tensions between industrial policies and the risk of reinforcing corporate dominance or regional disparities would have to be explored.

The following sections describe in more detail the goals that could be pursued by trade unions under existing EU competition rules, as well as the different entry points that are available for interventions. We will see that the delays for union intervention in ongoing investigations can be very tight. All involvement therefore requires action as early as possible in the proceedings. This is a challenge to the coordination of union positions at various levels of representation. In certain cases, however, a certain flexibility as to the form of trade union intervention may be available.

1.2 ANTITRUST RULES

The procedures for cartel investigations and abuses of dominant positions being similar, this section takes them together.

Abuse of dominant position

In the course of investigations into abuse of dominance, workers' representatives and trade unions could document harm to workers as a result of unfair labour practices. As described in Title III, section 5, unfair labour practices in a competition law context would include any term seeking to strengthen employers' power over individual workers, to keep wages artificially low or to restrict their ability to search for another job.

This includes for instance:

- “non-poaching” agreements, whereby firms agree not to compete or “poach” workers from each other;
- “non-compete” clauses, preventing the employee from working at a competitor.

Whilst no compete clauses may have some justification for workers handling trade secrets, they are clearly abusive in the case of low- and middle-skilled workers;

- algorithms ranking workers, making it difficult to seek work from different platforms;
- wage cartels, where companies collude to fix wages.

Recent Commission declarations lead us to believe that trade unions could successfully adopt an offensive strategy for such unfair labour practices through the lodging of formal complaints[81]. Precedents can already be found in national law.

In February 2021, the Dutch competition authority initiated an investigation into supermarkets which made arrangements regarding a limited wage increase of 2.5% for their employees. The mutual arrangements were made after collective agreement negotiations broke down and without trade union consent[82].

In a 2021 report, the Portuguese competition authority raised awareness of the potential negative effects for workers and consumers resulting from anti-competitive agreements in the labour markets. This report provides several examples of how non-poaching and wage-fixing agreements deprive workers of the opportunities of an open and competitive labour market. Labour markets were among the priorities set for the Portuguese competition authority in 2021 (Autoridade da Concorrencia, 2021).

Sustainability agreements

Title II, section 3 has described how the relaxing of antitrust rules for agreements between competitors due to their beneficial impact on sustainability should be welcomed with appropriate caution, considering potential risks of increased corporate power.

Before clearing the agreement, the EU Commission should assess any risk of labour market concentration which could ultimately be harmful to employment (see our recommendations under section 1.3 below).

Secondly, collective labour rights should be considered an essential element of sustainability agreements. The close involvement of employees in such horizontal cooperation agreements is an essential element of balanced power within firms and a strong guarantee against green and social washing. Environmental and social objectives when assessed together with stakeholders including trade unions and workers' representatives yield better sustainability results. With regard to the switch to greener production in particular, the “just transition” principles should be part of the conditions to which firms must adhere in order to clear their agreement[83].

Finally, where there is a risk that companies may seek sustainability agreements to circumvent collective agreements, competition law should apply in full so as to prevent employers from coordinating or making mutual arrangements regarding wages and working conditions.

81 See above note 28

82 The Dutch competition act, for instance, prohibits employers from putting in place mutual arrangements, including recommendations issued by trade associations, regarding wages and terms of employment. The prohibition does not apply to employers negotiating with trade unions. ACM suspends investigation into possible wage-fixing cartel between supermarkets after conclusion of collective agreement | ACM.nl

83 "Nothing About Us Without Us: A Just Transition Manifesto"

84 OECD (2021), *Engagement with trade unions in due diligence processes conducted by industry-led or multistakeholde initiatives*, p.6

In cases where the agreement in question is a multistakeholder initiative, due attention should be paid to the risk of undermining workers' representation instances. In the absence of robust trade union engagement, such initiatives are indeed likely to be company-led and put in place for social washing. On this, the OECD has clarified that as a general rule companies should prioritise engagement with representative trade unions[84].

Collective agreements

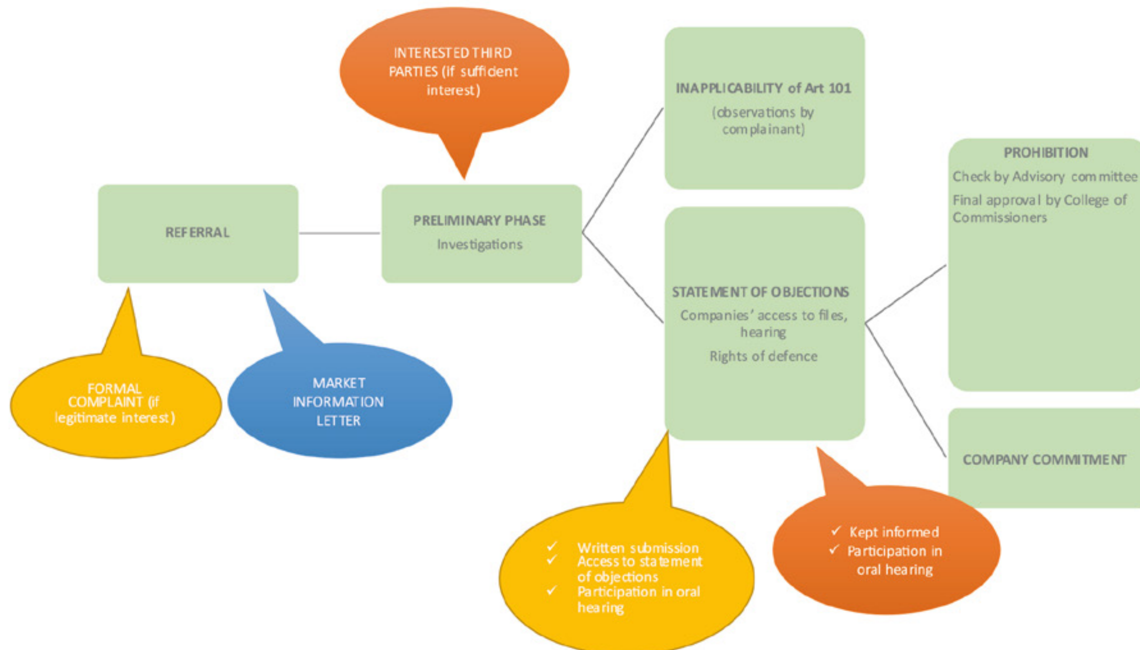
The Commission's Guidelines on the application of competition rules to collective agreements of the solo self-employed is an important step for the protection of collective bargaining. Collective agreements are indeed shielded from anti-cartel rules (see Title II, section 3).

These Guidelines constitute a first inroad into the consumer welfare standard as they recognise that social objectives and the need to promote better working conditions justify a restriction of competition on the side of the labour supply.

Commission Guidelines are not legally binding on the EU Court or national competition authorities, although they do have an authoritative effect. We therefore recommend that trade unions monitor closely the application of these principles by the national competition authorities and anticipate potential legal challenges in front of the EU Court of Justice. The possibility of strengthening these Guidelines through national regulation should also be explored.

Entry points for trade union involvement in antitrust proceedings[85]

Figure 25 Overview of entry points in antitrust proceedings



Antitrust proceedings present the most openings for a trade union to make its voice heard. They could therefore be considered an important element of an offensive trade union strategy.

85 This section draws upon a presentation made by EU Commission officials to an ETUC workshop organised as part of this project on 7 December 2022

Trade unions can submit **formal complaints** asking the Commission to initiate an antitrust investigation. To be admissible, formal complaints must:

- Provide detailed information on the alleged infringement, including the names of the companies involved, market information and any available evidence;
- Show that complainants have a “legitimate interest”, meaning that they are adversely affected by the alleged infringement.

The Commission is required to carefully examine the formal complaint. In the case that the complaint is rejected, the Commission’s decision can be appealed.

Admissible formal complaints allow trade unions to enjoy procedural rights in the investigation:

- Access to a non-confidential version of the statement of objection, i.e. the preliminary document where the Commission explains its antitrust concerns to the investigated parties and describes the supporting evidence;
- Possibility to express in writing their views on the statement of objection, for example to advocate for a different interpretation of the facts under investigation;
- Right to participate in the Oral Hearing, where they can listen to the arguments presented by the investigated parties and present their views in front of the Commission’s top management.

It is important to note that the complainant does not become an actual party to the proceedings as the investigation targets the company.

Formal complaints must be submitted via a form (“Form C”), copied in Annex III of this report.

Trade unions may instead of lodging a formal complaint decide to send a “**market information letter**” with a view to bringing certain facts to the attention of the EU Commission and to advocate for the start of an investigation.

Market information letters have a more flexible format than formal complaints. There are no strict requirements on the content of the letter and no necessity to show legitimate interest. However, these letters do not entail procedural rights for the informant. There is no obligation on the Commission to issue a rejection decision if it does not pursue the investigation. If the Commission does open an investigation, the informant enjoys no particular rights during the proceedings.

Market information letters should be sent by email to: **comp-marketinformation@ec.europa.eu**. The sender is invited to indicate their name and address, identify the firms and products concerned and describe the practice observed.

In the case that a trade union did not file a formal complaint, it can still actively participate in antitrust proceedings as an interested third party. To be admitted as **interested third parties**, applicants must show “sufficient interest” in the proceedings. Sufficient interest is less difficult to establish than the legitimate interest required to file a complaint.

Trade unions admitted as interested third parties enjoy the following procedural rights:

- The Commission must inform them of subject of proceedings and allow them to submit their views. There is no formal right to receive the statement of objection but this may be granted in some cases;
- They can be admitted to the Oral Hearing.

In the course of a proceeding for abuse of dominant position, the company may voluntarily offer commitments to address the Commission's competition concerns. If the Commission is convinced, it will conclude the investigation and not issue a fine.

Before the conclusion of the investigation, commitments are published on the Commission's website with a view to having them "market tested". A trade union can then express its view on the commitments' effectiveness to address its concerns and propose improvements.

All updates on antitrust cases, including openings of new cases and publication of proposed commitments by the company, are published by event date on the Commission website[86]. It is also possible to search ongoing or past cases via an online search form, using for instance company name or economic sector.

The antitrust registry can be contacted at: **comp-greffe-antitrust@ec.europa.eu**

1.3 MERGER CONTROL

Goals

As described in Title III, section 3, a merger or an acquisition is nearly always followed by restructuring, with an impact on employment levels, substantial changes in production processes or work organisation and possible offshoring. Trade unions therefore have a strong interest in ensuring that EU competition authorities systematically anticipate and mitigate the adverse employment impact of a planned concentration.

A first step should be to ascertain whether workers have been informed and consulted by the companies concerned about the decision leading to the merger or acquisition, and whether they will be involved in any future restructuring plan. This is an essential step to mitigate the adverse impact on jobs usually entailed in large mergers.

Second, the efficiency test currently applied by the Commission to assess the competition impact of a planned concentration should be enlarged to assess any risk of an excessively imbalanced relation between the prospective employer and the workforce. A number of economic studies offer methodologies to adjust competition tests currently used to measure monopoly power. The idea is to assess whether the prospective employer can lower wages and degrade working conditions below what would normally apply in a competitive market (Marinescu, 2018; Naidu 2019).

Faced with the risk of labour-market monopsony, behavioural remedies should be imposed by the Commission so as to address the power asymmetry. Such remedies must include union-friendly policies, including collective bargaining coverage and the presence of instances for workers' representation. And just like a merger can be refused in the case of excessive supplier power, it should also be possible to stop mergers when a labour-market monopsony which cannot be addressed by structural and behavioural remedies is arising around the corner.

86 Competition Policy (europa.eu)

Third, workers' representatives and trade unions should be consulted on the remedies that are often imposed by the EU Commission during merger-control procedures. Currently, the impact of structural remedies on jobs are rarely assessed. Yet, a sale or a divestment can have radical employment effects.

Overall, trade unions may wish to further explore the potential tensions between, on the one hand, the need to promote competitive and job-creating industries and, on the other hand, risks linked to size and labour-market monopsonies (see Box 7).

Box 7 Industrial policies and corporate power – a delicate balancing act

Critics of EU competition policies argue that one of the consequences of a static competitive analysis is a disregard for dynamic industrial policies. Industrial policies aim at changing the volume and quality of business production in order to increase the economic performance of a given sector.

France and Germany have for example sent to the EU Commission a "Manifesto for a European industrial policy fit for the 21st Century", in which they urge the EU Commission to better take into account competition at a global level in merger-control assessments[87].

As far as state subsidies are concerned, IndustriALL recalls in its Just Transition Manifesto that moving to a low-carbon economy requires supportive industrial policies, including investment in the transformation of industrial sites and infrastructure, addressing carbon costs and creating lead markets for innovative products.

On the other hand, concerns have also been expressed about industrial policies translating into overcapacity and harmful dumping practices. For these, trade policies are more appropriate to deal with the issue of unfair competition in global markets.

Above all, tensions will also arise when relaxed competition enforcement leads to the further strengthening of oligopolies which feed into labour-market monopsonies and have an adverse impact on wages and employment levels (see above Title III, section 4.2).

Civil society is also expressing concerns about the impact of private monopolies on the economy and social welfare. Nick Shaxson, co-founder of the Balanced Economy Project, considers for instance that:

"national champions" need to be treated with caution, for several reasons. First, if global economic success is accompanied by dominance, the net economy-wide effect of that dominance hurts workers overall, even if the "champion" itself offers relatively good employment.

Second, supporting a "national champion" typically involves transferring resources from other parts of the economy to help the champion compete internationally. This transfer may be through e.g. corporate tax cuts, deregulation, wage cuts, etc. This is likely a win-lose that worsens inequality overall. Be clear who the losers are, across the economy.

Third, it depends on the sector. Big Tech and Big Finance are vastly more dangerous to workers and citizens (economy-wide) than for instance Big Steel.
Fourth, is a diverse, balanced economy with rich economic ecosystems, local supply chains, etc. any less "competitive" internationally than an unbalanced, heavily monopolised one? Of course not[88].

Careful reflection is therefore warranted on the objectives and design of industrial policies and their relation to sustainable competition. In its Resolution on EU open strategic autonomy[89], the ETUC supports key strategic policy framework to mitigate increased EU vulnerability due to disruptive crisis situations but also calls for a strong focus on social and democratic dimensions. The ETUC asks that this agenda is articulated around several social priorities:

1. *Sustainable quality jobs in the EU*
2. *A strong focus on education, training, reskilling and upskilling of the EU workforce*
3. *Enhanced democracy at work, with a strong role for social partners*
4. *Creation of sustainable supply chains and reliance on strong regulations against social dumping, as well as concrete action for more sustainable rules-based trade practices*
5. *A strong role for public services, and ensuring quality public infrastructures*
6. *Sufficient investment*

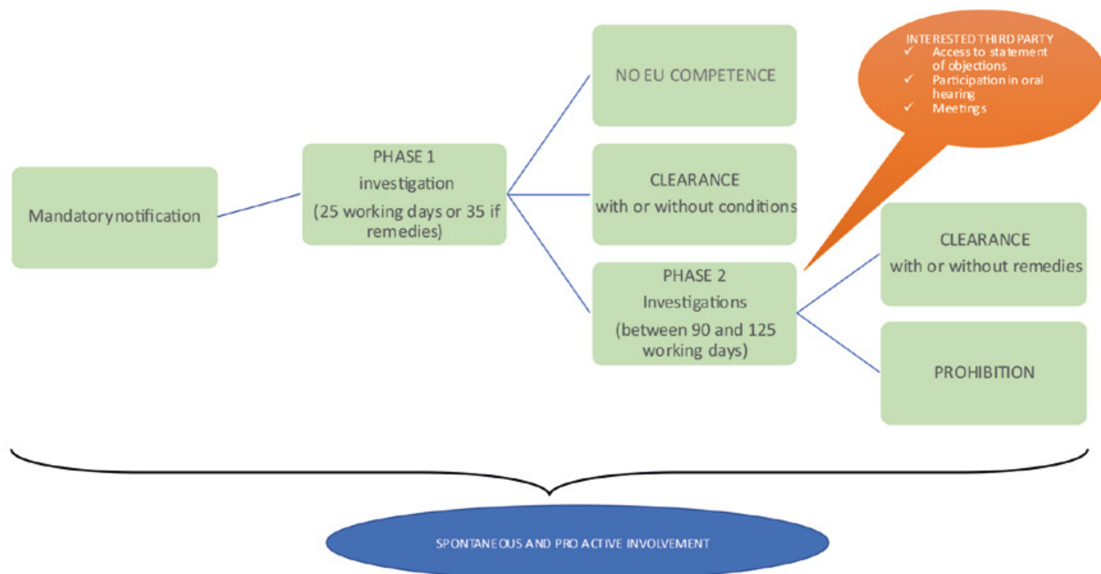
87 See above note 20

88 Written statement shared with participants of an ETUC workshop on 7 December 2022

89 Positioning the ETUC for an EU open strategic autonomy with a strong social agenda | ETUC EU strategic autonomy refers to the capacity of the EU to act autonomously – that is, without being dependent on other countries – in strategically important policy areas.

Entry points for trade union involvement in merger control[90]

Figure 26 Overview of entry points in merger controls



Merger control offers fewer opportunities for trade unions than antitrust proceedings. Formal requests for information are largely reserved for companies, in practice usually customers and competitors of the merging parties.

Trade unions could, however, seek **involvement on a proactive basis** through spontaneous written contributions relating to the transaction or proposed remedies to the extent that the latter are made public. Meetings with Commission officials could also be sought. Any submission or minutes of discussions will form an integral part of the Commission's case file.

A notice is published on the Commission's website at the beginning of every Phase I investigation:
http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_merger_by_date.

Trade unions can thus track merger notifications online and contact the Commission to submit comments.

As far as formal involvement is concerned, this can only be envisaged after a Phase II investigation has been initiated. Unions then have the possibility to be admitted as an **interested third party**. Third parties considered as having a "sufficient interest" include, for example, workers' representatives. To this end, an application must be made to the Hearing Officer responsible for the case.

As an interested third party, trade unions can:

- Receive a non-confidential version of the statement of objections;
- Participate in the Oral Hearing (the hearing is at the merging parties' discretion); and
- Be invited for meetings to discuss and clarify specific issues raised.

90 See above note 85

A Phase II investigation lasts 90 days as a matter of principle, which can be extended by another 15 and 20 working days. Applications to be admitted as an interested third party must be made to the Hearing Officers responsible for the case at: **hearing.officer@ec.europa.eu**

Hearing Officers are independent from EU Commission officials responsible for the case. They are not in charge of receiving substantive submissions or comments[91].

When drafting submissions, either on a proactive basis or as part of an interested third-party process, good practices include:

- explaining the representativeness of the trade union in the relevant company, industry
- and/or country;
- whenever appropriate, providing information on the merging parties in relation to the transaction (workers' representatives will often know more about the proposed transaction than the Commission officials);
- providing concrete evidence on the working of the relevant businesses and markets.

1.4 STATE AID TO THE PRIVATE SECTOR

Goals

At the time of writing this report, governments are injecting liquidity into the private sector at an unprecedented level to help European companies face the pandemic and the energy crisis (see above Title IV.4). Firms receiving state support to safeguard employment should fulfil that goal. A precondition for financial assistance in general, and in particular for the funding of short-term work, should therefore be that the beneficiary company maintains current workforce levels, wages and benefits. To this end, appropriate monitoring mechanisms, including through dialogue with worker representation instances, can be considered a useful tool.

Trade unions could also intervene to demand that other financial assistance, in particular as part of industrial policies, contain social conditionalities in order to secure just transitions. The design of such social conditionalities should be elaborated with the full involvement of trade union representatives in the sector/company concerned. Mostly, social conditionalities would require that state aid recipients engage in collective bargaining processes with a view to anticipating changes and to put in place appropriate supporting measures in the transition to new jobs (e.g. reskilling, options for retirement and remuneration (IndustriALL, 2022).

Title I, section 4 has also described how subsidies to rescue companies in economic difficulty are considered by the EU Commission as the most distorting form of state aid. They are cleared only as a last resort and are usually on the condition that strict restructuring plans are implemented with a view to making savings. The restructuring plans often involve the cessation of certain economic activities and cost-cutting measures with a direct impact on the workforce.

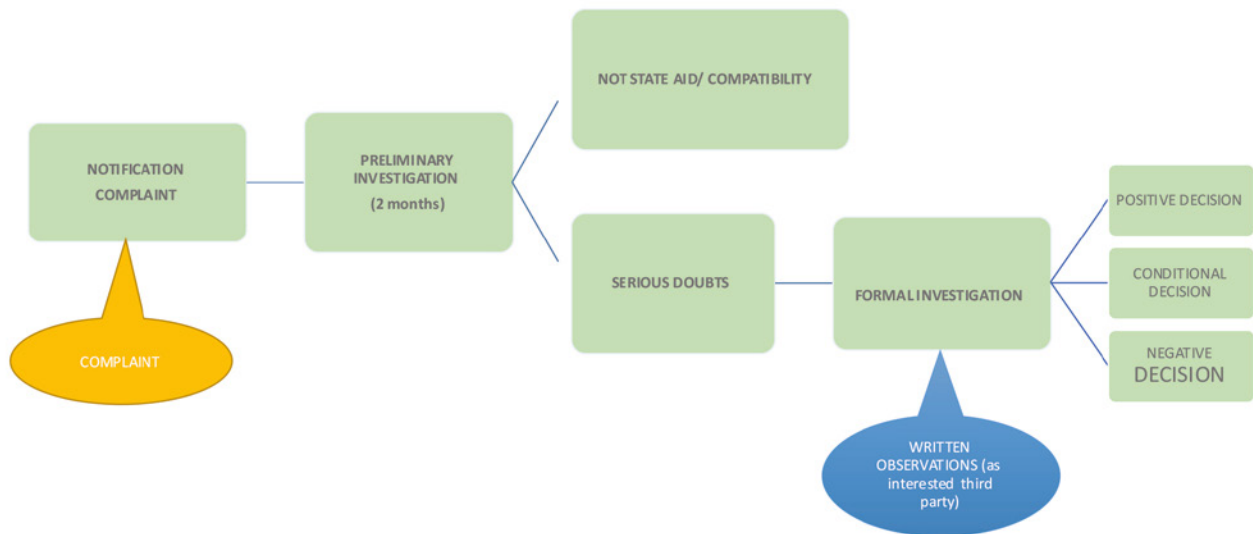
In this context, trade unions have an interest in ensuring that public authorities have a sufficient margin of manoeuvre to safeguard local employment. They should also be closely involved in the decision to implement a restructuring plan as well as its content.

With regard to industrial policies, trade unions may wish to further explore the tensions, with potential risks linked to size and labour-market monopsonies (see above Box 7).

91 The Hearing Officers (europa.eu)

Entry points for trade union involvement in state aid proceedings[92]

Figure 27 Overview of entry points in state aid



State aid is the area with the poorest third-party rights.

Any legal or natural person may trigger a state aid investigation by **lodging a complaint** with the Commission. This route could be used by trade unions wishing to bring to the attention of EU competition authorities the unfair advantage gained by service providers established in Member States that do not implement EU labour law to the required standard (see above Title IV, section 5.3).

As far as ongoing investigations are concerned, trade union ability to take part in EU assessment is limited. "**Interested third parties**" have a short window of one month to submit observations where a formal investigation is opened, i.e. when the EU Commission has serious doubts about compatibility.

A trade union may be an interested party if it shows that its interests or those of its members might be affected by the granting of the aid. The assessment of what may or may not constitute an interest is carried out by the Commission, on a case-by-case basis.

Trade unions wishing to submit a complaint or register as an "interested third party" should submit the complaint form copied in Annex IV of this report. The completed form should be sent to: **stateaidgreffe@ec.europa.eu**

Another possibility for a trade union to intervene in a state aid case is to initiate a judicial procedure against a Commission decision before the General Court of the CJEU. As an interested party, a trade union can challenge a decision not raising objections to state aid with a view to triggering the opening of a formal investigation procedure. Trade unions may also challenge the outcomes of a formal investigation procedure if they can demonstrate that they are "individually concerned" by the decision. Such a possibility is interpreted narrowly by the Court.

Overall, a Court appeal is time and resource demanding. Whilst it should not be excluded altogether, it is unlikely to constitute a viable option for systematic trade union interventions in state aid investigations.

92 See above note 85

2. Beyond enforcement – a reform of competition law

2.1 DEMOCRATISING THE ENFORCEMENT

The relatively poor opportunities for third-party interventions in ongoing cases, in particular with regard to merger control and state aid, raise some questions in terms of legitimacy and the accountability of EU competition authorities' assessments. The EU Commission in particular may be insufficiently exposed to trade union and civil society argumentations. Whilst the investigated companies invest significant resources in legal and strategic counsel to make the case for their economic interests, EU proceedings come across as remote and unfriendly to interested third parties.

In a 2022 submission to the EU Commission, a group of civil society organisations expressed concerns about EU enforcement, which it considered to be an *isolated technocratic elite contrary to its original roots and, even more fundamentally, to its original function of dispersing economic power and serving as a guarantee for a democratic system*.

The submission therefore calls for a broader interpretation of the legitimate and sufficient interest concepts, through in particular the establishment of presumptions of such interest[93].

The submission put forward these recommendations in relation to antitrust proceedings. Arguably, there is an equally urgent need to democratise competition assessments in the context of merger and state aid investigations.

2.2 REVIEWING THE CURRENT APPROACH TO PUBLIC SERVICES

The EU and Member States should carry out a detailed assessment of the impact of EU competition principles on the sustainable financing and effectiveness of services of general economic interest in the light of the pandemic and the current energy and cost of living crisis. These deep crises have indeed brought to the forefront the role of public services in fostering resilience, addressing inequalities and securing quality jobs. They have also highlighted the endemic problem of public underfunding in certain essential sectors and thus may call into question the current economic model.

Depending on the conclusions of this assessment, trade unions may consider resuming demands for a European framework reaffirming the superior importance of public services over free-market principles. The Lisbon Treaty introduced a legal base for the adoption of EU legislation that could lead to a redefinition of services of general economic interest with due regard to their role in the territorial and social cohesion of the Union[94]. However, this legal base has never been used since the entry into force of the Lisbon Treaty.

Article 14 TFEU in particular was groundbreaking in the sense that it introduced a new sphere of regulation between market services and non-market services. In this "third sphere", market rules should no longer be in play and public services are to be governed by a different set of rules, to be devised in secondary legislation. This does not mean that the internal market rules would be totally excluded in relation to SGEIs – the Treaty must still be respected – but the internal market notion will have to be redefined in relation to SGEIs. The EU and Member States have done little, however, to develop the concept of non-market services and to apply it more systematically.

93 Microsoft Word – CSOs submission Reg 1_2003 (balancedeconomy.net)

94 Art 14 TFEU, Protocol on services of general interest

A European intervention on public services would not come as a replacement of national competences. This domain is indeed marked by a high diversity of traditions. Thus, there needs to be a reflection on if and how reclaiming public ownership or control of essential, taking into consideration local impact on human needs and income inequalities.

A revision of Protocol 26 on services of general interest with a view to including these principles could also be an important element of the next revision of the European Treaties.

Box 8 The case for insourcing public services

In order to comply with the EU rules governing the financing of services of general economic interest, public authorities are required to establish that there has not been over or unnecessary compensation to cover the cost incurred in the discharge of a public service obligation. The European Public Services Union ("EPSU") argues that national and local authorities would encounter fewer technical difficulties as well as improve quality of employment and services if they bring services back in-house.

More could be done too when public services are outsourced to impose strong social and environmental conditions and to avoid complex and risky contracts (e.g. public-private partnerships – "PPPs").

A report published in June 2017 provides over 800 examples of illustrations of remunicipalisation and re-nationalisation as city councils and governments across the world recognise that in-house provision delivers better quality services (Satoko et al, 2017).

2.3 ENLARGING CONSUMER WELFARE

Trade unions getting proactively involved in merger control and state aid cases may find it arduous to convince EU competition authorities to assume a protective role towards workers' rights. Thus, a reflection on longer-term demands and advocacy strategy for a fundamental reform of EU competition principles should be explored.

Competition authorities mostly focus on what is considered harmful to free markets and consumer choice. This narrow approach precludes assessing the impact of corporate power on democracy, the environment and social progress.

In contrast, introducing a public interest test into competition law would increase the capacity of competition authorities to capture the reality of economic power – having regard not just to products and services but also ownership of capital, and firms' ability to charge prices exceeding the marginal cost of production and/or to obtain extraordinary profits. From there, stricter competition assessments should be expected, with prohibitions and remedies seeking to achieve broader sustainability goals.

Proponents of narrow consumer welfare standards often take the view that enlarging competition assessments to public interest will ultimately weaken competition enforcement or make it more politicised. This is because there is no stable definition of public interest, which in turn may open the door to unpredictable outcomes of merger control and legal challenges by companies.

Societal cost/benefit analyses are, however, frequently applied by public authorities when seeking to quantify non-economic interests and wider societal costs (positive and negative externalities).

It should also be recalled that the consumer welfare approach, in itself a political choice, is not prescribed by the Treaties but is the result of an interpretation by the EU competition authorities. As we have described in Title I of this report, the objectives of the Union are framed around the concepts of competitive social market economy, general interest as well as open market.

It is therefore possible to explore a change of course so that competitive effects can be analysed not just in terms of price and consumer choice but also employment, social progress and improvement of the quality of the environment.

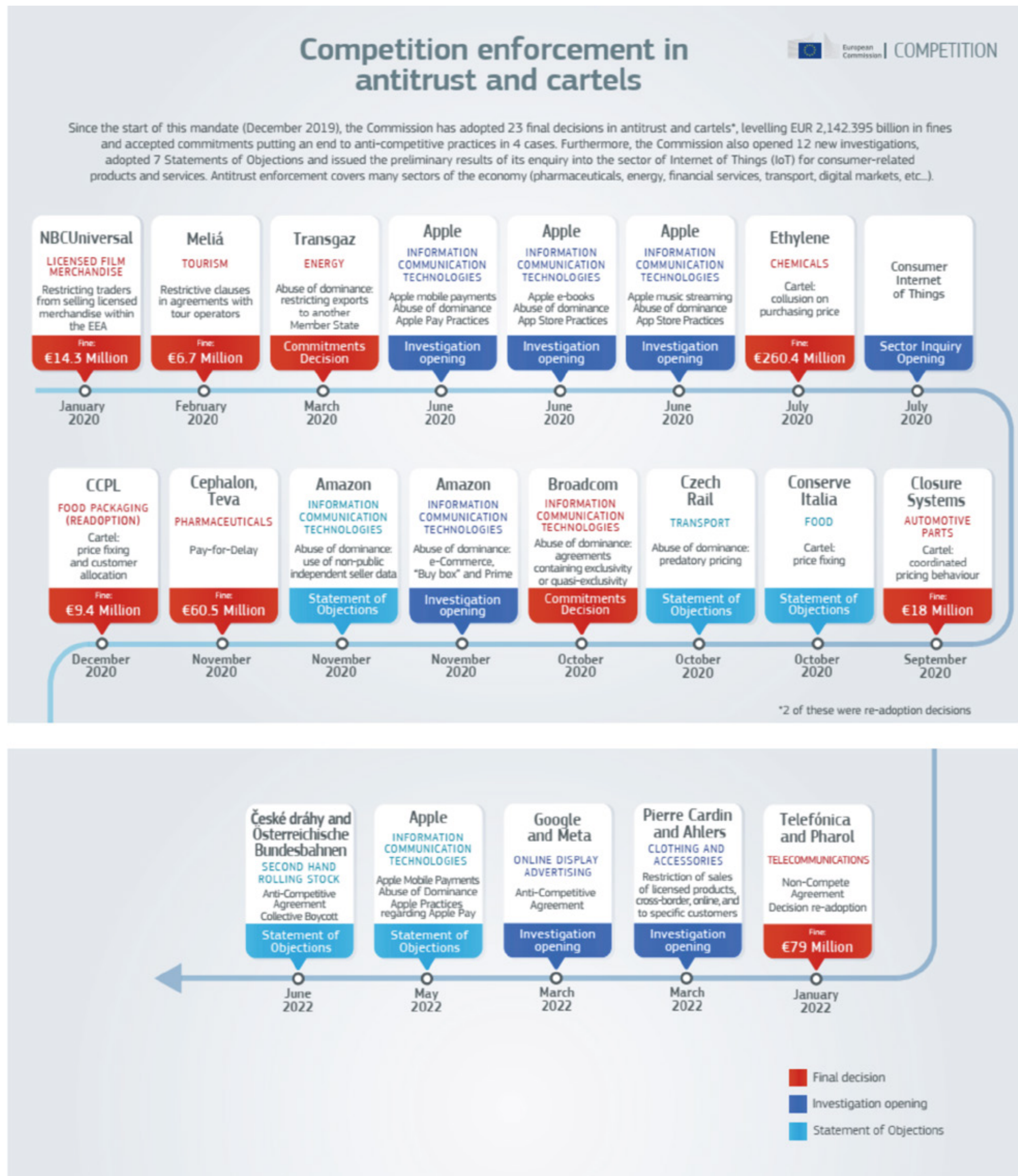
Inspiration should be sought from national traditions that have long introduced or are exploring a public interest test as part of their competition policies. In South Africa, competition authorities have a long-standing tradition of bringing social partners around the table to negotiate behavioural remedies that seek to mitigate mergers' adverse impact on jobs. South African unions obtain a copy for every merger filing[95]. In the US, lively discussions are currently taking place around a reform of antitrust laws in the light of dramatically increasing corporate power, for instance in the digital sector. As far as employment is concerned, US competition authorities are increasingly taking action against abusive labour practices as well as mergers that reduce competition for labour[96].

95 New trade union notification rules for merging companies in South Africa – Bowmans (bowmanslaw.com)

96 Employers Beware: Aggressive and Expansive Labor-Focused Antitrust Enforcement Will Remain The New Normal – Gibson Dunn

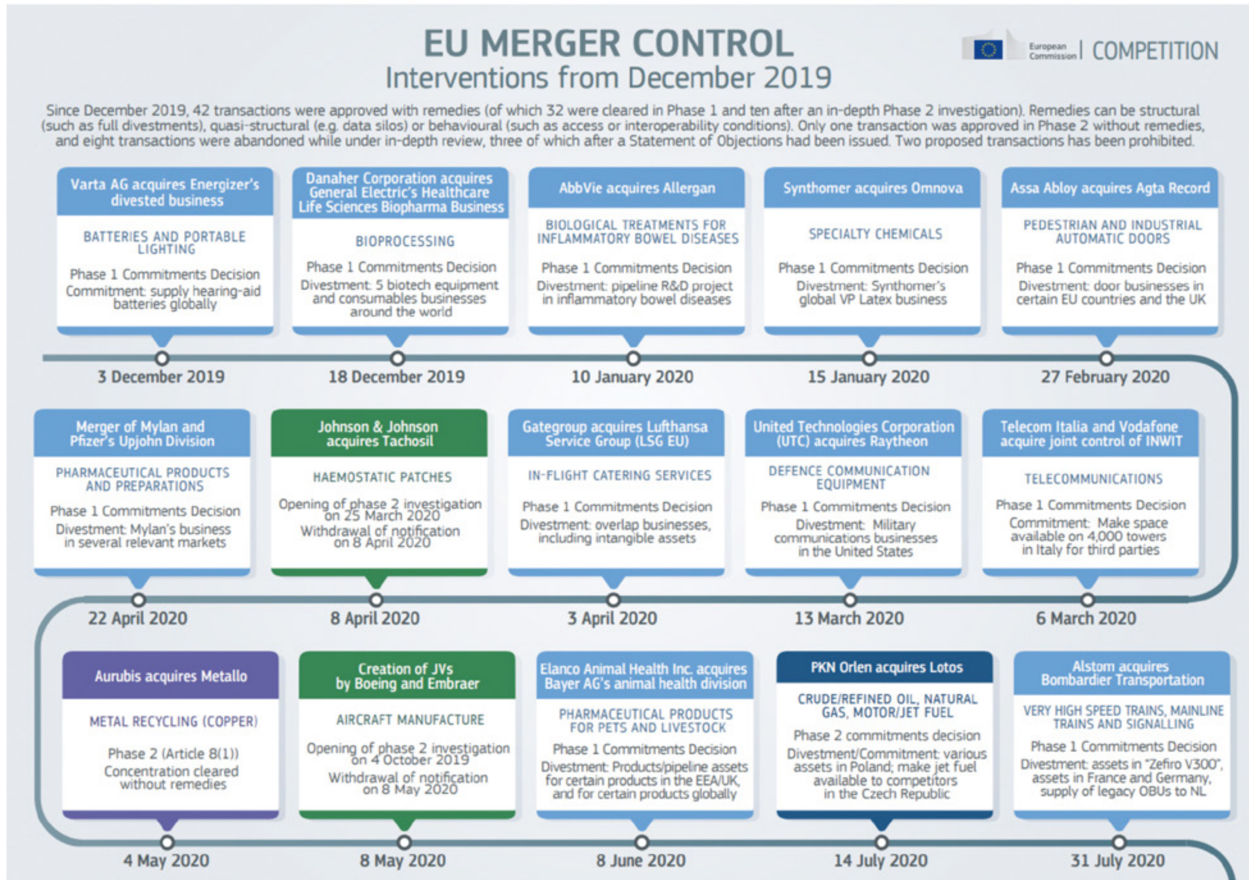
ANNEX I: Antitrust and cartel investigations in 2020-2021

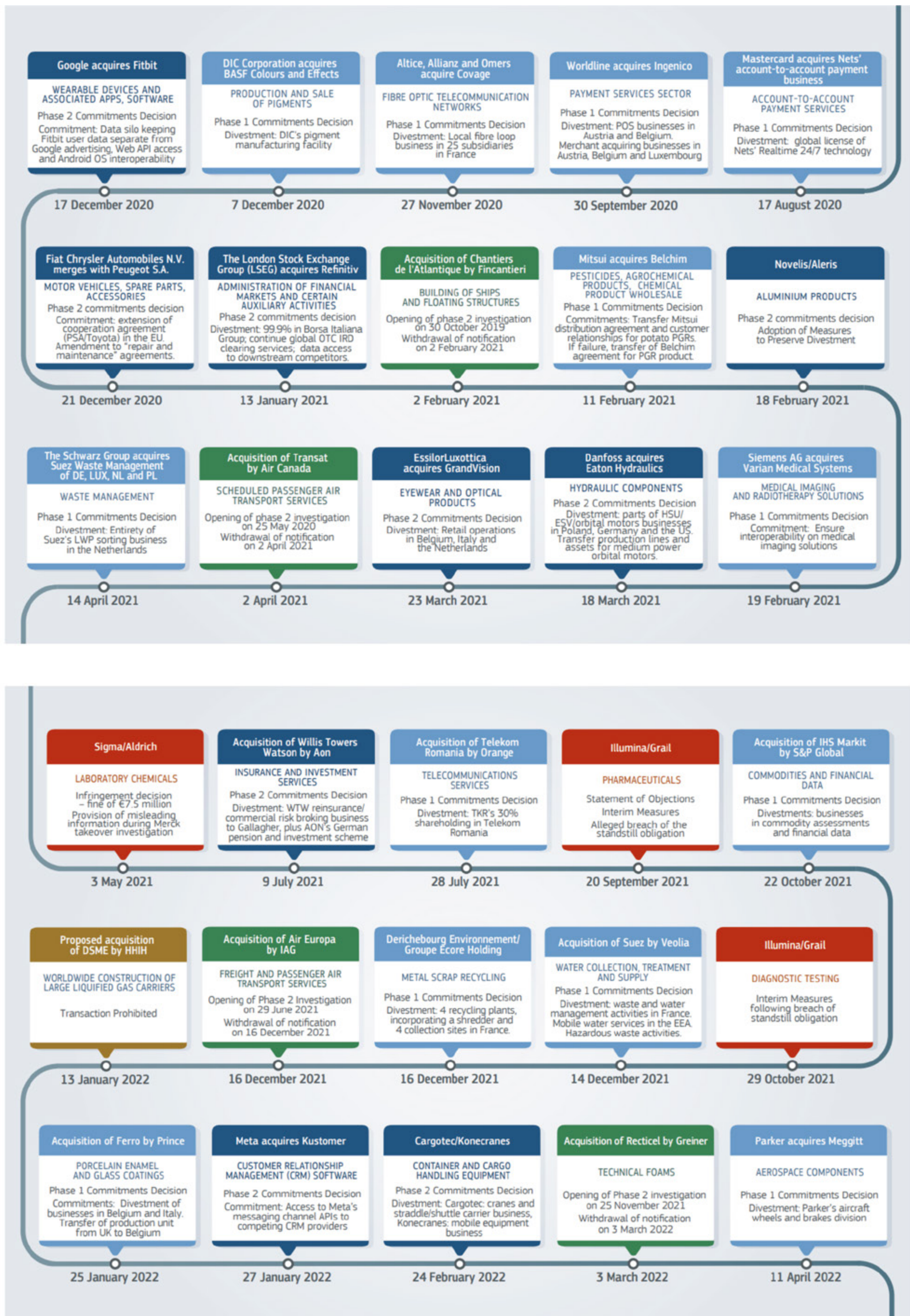
Source: (European Commission, last accessed 03/01/2023)

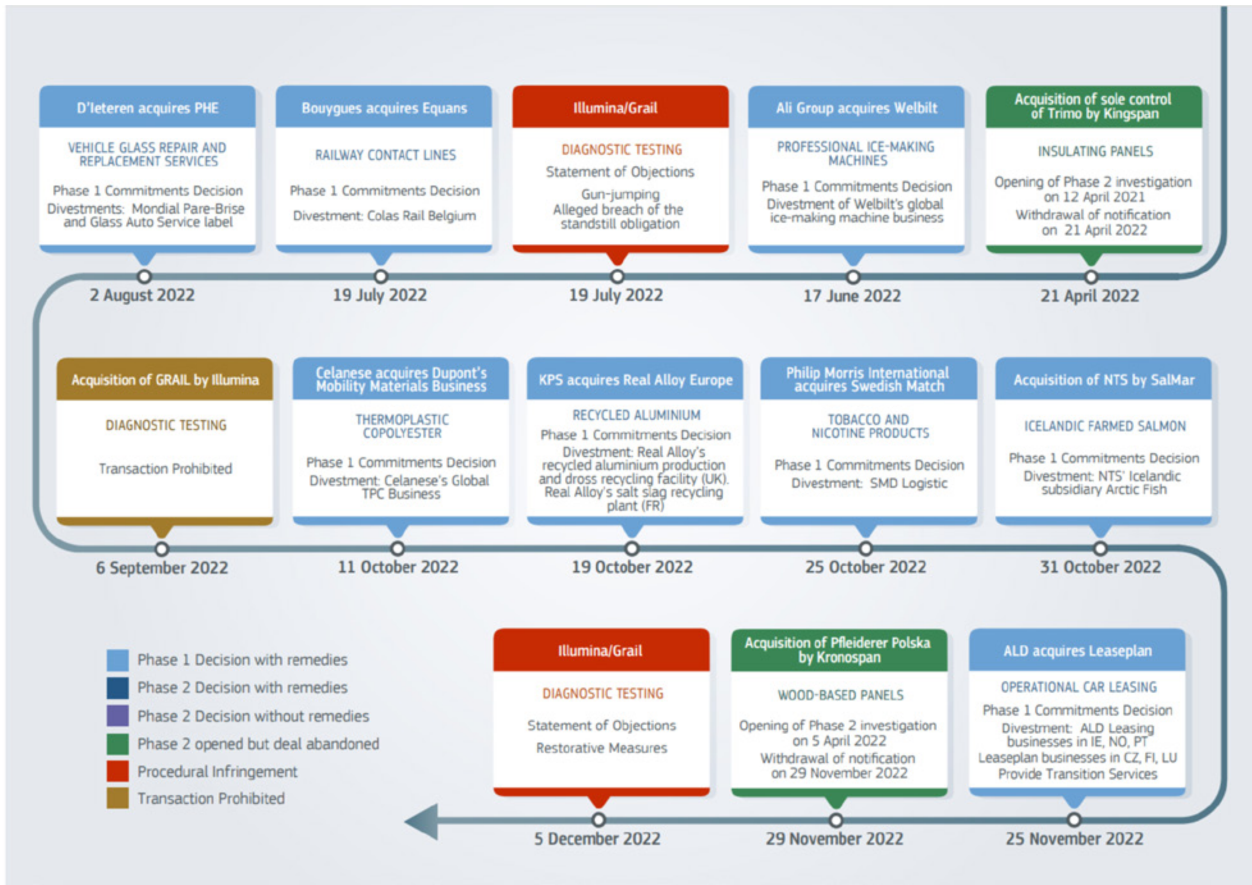


ANNEX II: EU merger control – interventions since December 2019

Source: (DG Competition website, accessed on 06.01.2023)




Google acquires Fitbit
WEARABLE DEVICES AND ASSOCIATED APPS, SOFTWARE
Phase 2 Commitments Decision
Commitment: Data silo keeping Fitbit user data separate from Google advertising, Web API access and Android OS interoperability
17 December 2020
DIC Corporation acquires BASF Colours and Effects
PRODUCTION AND SALE OF PIGMENTS
Phase 1 Commitments Decision
Divestment: DIC's pigment manufacturing facility
7 December 2020
Altice, Allianz and Omers acquire Covage
FIBRE OPTIC TELECOMMUNICATION NETWORKS
Phase 1 Commitments Decision
Divestment: Local fibre loop business in 25 subsidiaries in France
27 November 2020
Worldline acquires Ingenico
PAYMENT SERVICES SECTOR
Phase 1 Commitments Decision
Divestment: POS businesses in Austria and Belgium. Merchant acquiring businesses in Austria, Belgium and Luxembourg
30 September 2020
Mastercard acquires Nets' account-to-account payment business
ACCOUNT-TO-ACCOUNT PAYMENT SERVICES
Phase 1 Commitments Decision
Divestment: global license of Nets' Realtime 24/7 technology
17 August 2020
Fiat Chrysler Automobiles N.V. merges with Peugeot S.A.
MOTOR VEHICLES, SPARE PARTS, ACCESSORIES
Phase 2 commitments decision
Commitment: extension of cooperation agreement (PSA/Toyota) in the EU. Amendment to "repair and maintenance" agreements.
21 December 2020
The London Stock Exchange Group (LSEG) acquires Refinitiv
ADMINISTRATION OF FINANCIAL MARKETS AND CERTAIN AUXILIARY ACTIVITIES
Phase 2 commitments decision
Divestment: 99.9% in Borsa Italiana Group; continue global OTC IRD clearing services; data access to downstream competitors.
13 January 2021
Acquisition of Chantiers de l'Atlantique by Fincantieri
BUILDING OF SHIPS AND FLOATING STRUCTURES
Opening of phase 2 investigation on 30 October 2019
Withdrawal of notification on 2 February 2021
2 February 2021
Mitsui acquires Belchim
PESTICIDES, AGROCHEMICAL PRODUCTS, CHEMICAL PRODUCT WHOLESALE
Phase 1 Commitments Decision
Commitments: Transfer Mitsui distribution agreement and customer relationships for potato PGRs. If failure, transfer of Belchim agreement for PGR product.
11 February 2021
Novelis/Aleris
ALUMINIUM PRODUCTS
Phase 2 commitments decision
Adoption of Measures to Preserve Divestment
18 February 2021
The Schwarz Group acquires Suez Waste Management of DE, LUX, NL and PL
WASTE MANAGEMENT
Phase 1 Commitments Decision
Divestment: Entirety of Suez's LWP sorting business in the Netherlands
14 April 2021
Acquisition of Transat by Air Canada
SCHEDULED PASSENGER AIR TRANSPORT SERVICES
Opening of phase 2 investigation on 25 May 2020
Withdrawal of notification on 2 April 2021
2 April 2021
EssilorLuxottica acquires GrandVision
EYEWEAR AND OPTICAL PRODUCTS
Phase 2 Commitments Decision
Divestment: Retail operations in Belgium, Italy and the Netherlands
23 March 2021
Danfoss acquires Eaton Hydraulics
HYDRAULIC COMPONENTS
Phase 2 Commitments Decision
Divestment: parts of HSU/ESV/orbital motors businesses in Poland, Germany and the US. Transfer production lines and assets for medium power orbital motors.
18 March 2021
Siemens AG acquires Varian Medical Systems
MEDICAL IMAGING AND RADIOTHERAPY SOLUTIONS
Phase 1 Commitments Decision
Commitment: Ensure interoperability on medical imaging solutions
19 February 2021
Sigma/Aldrich
LABORATORY CHEMICALS
Infringement decision – fine of €7.5 million
Provision of misleading information during Merck takeover investigation
3 May 2021
Acquisition of Willis Towers Watson by Aon
INSURANCE AND INVESTMENT SERVICES
Phase 2 Commitments Decision
Divestment: WTW reinsurance/ commercial risk broking business to Gallagher, plus AON's German pension and investment scheme
9 July 2021
Acquisition of Telekom Romania by Orange
TELECOMMUNICATIONS SERVICES
Phase 1 Commitments Decision
Divestment: TKR's 30% shareholding in Telekom Romania
28 July 2021
Illumina/Grail
PHARMACEUTICALS
Statement of Objections
Interim Measures
Alleged breach of the standstill obligation
20 September 2021
Acquisition of IHS Markit by S&P Global
COMMODITIES AND FINANCIAL DATA
Phase 1 Commitments Decision
Divestments: businesses in commodity assessments and financial data
22 October 2021
Proposed acquisition of DSME by HHIH
WORLDWIDE CONSTRUCTION OF LARGE LIQUIFIED GAS CARRIERS
Transaction Prohibited
13 January 2022
Acquisition of Air Europa by IAG
FREIGHT AND PASSENGER AIR TRANSPORT SERVICES
Opening of Phase 2 Investigation on 29 June 2021
Withdrawal of notification on 16 December 2021
16 December 2021
Derichebourg Environnement/ Groupe Ecore Holding
METAL SCRAP RECYCLING
Phase 1 Commitments Decision
Divestment: 4 recycling plants, incorporating a shredder and 4 collection sites in France.
16 December 2021
Acquisition of Suez by Veolia
WATER COLLECTION, TREATMENT AND SUPPLY
Phase 1 Commitments Decision
Divestment: waste and water management activities in France. Mobile water services in the EEA. Hazardous waste activities.
14 December 2021
Illumina/Grail
DIAGNOSTIC TESTING
Interim Measures following breach of standstill obligation
29 October 2021
Acquisition of Ferro by Prince
PORCELAIN ENAMEL AND GLASS COATINGS
Phase 1 Commitments Decision
Commitments: Divestment of businesses in Belgium and Italy. Transfer of production unit from UK to Belgium
25 January 2022
Meta acquires Kustomer
CUSTOMER RELATIONSHIP MANAGEMENT (CRM) SOFTWARE
Phase 2 Commitments Decision
Commitment: Access to Meta's messaging channel APIs to competing CRM providers
27 January 2022
Cargotec/Konecranes
CONTAINER AND CARGO HANDLING EQUIPMENT
Phase 2 Commitments Decision
Divestment: Cargotec: cranes and straddle/shuttle carrier business, Konecranes: mobile equipment business
24 February 2022
Acquisition of Recticel by Greiner
TECHNICAL FOAMS
Opening of Phase 2 investigation on 25 November 2021
Withdrawal of notification on 3 March 2022
3 March 2022
Parker acquires Meggitt
AEROSPACE COMPONENTS
Phase 1 Commitments Decision
Divestment: Parker's aircraft wheels and brakes division
11 April 2022


D'Ieteren acquires PHE
VEHICLE GLASS REPAIR AND REPLACEMENT SERVICES
Phase 1 Commitments Decision
Divestments: Mondial Pare-Brise and Glass Auto Service label
2 August 2022
Bouygues acquires Equans
RAILWAY CONTACT LINES
Phase 1 Commitments Decision
Divestment: Colas Rail Belgium
19 July 2022
Illumina/Grail
DIAGNOSTIC TESTING
Statement of Objections
Gun-jumping
Alleged breach of the standstill obligation
19 July 2022
Ali Group acquires Welbilt
PROFESSIONAL ICE-MAKING MACHINES
Phase 1 Commitments Decision
Divestment of Welbilt's global ice-making machine business
17 June 2022
Acquisition of sole control of Trimo by Kingspan
INSULATING PANELS
Opening of Phase 2 investigation on 12 April 2021
Withdrawal of notification on 21 April 2022
21 April 2022
Acquisition of GRAIL by Illumina
DIAGNOSTIC TESTING
Transaction Prohibited
6 September 2022
Celanese acquires Dupont's Mobility Materials Business
THERMOPLASTIC COPOLYESTER
Phase 1 Commitments Decision
Divestment: Celanese's Global TPC Business
11 October 2022
KPS acquires Real Alloy Europe
RECYCLED ALUMINIUM
Phase 1 Commitments Decision
Divestment: Real Alloy's recycled aluminium production and dross recycling facility (UK). Real Alloy's salt slag recycling plant (FR)
19 October 2022
Philip Morris International acquires Swedish Match
TOBACCO AND NICOTINE PRODUCTS
Phase 1 Commitments Decision
Divestment: SMD Logistic
25 October 2022
Acquisition of NTS by SalMar
ICELANDIC FARMED SALMON
Phase 1 Commitments Decision
Divestment: NTS' Icelandic subsidiary Arctic Fish
31 October 2022
Phase 1 Decision with remedies
Phase 2 Decision with remedies
Phase 2 Decision without remedies
Phase 2 opened but deal abandoned
Procedural Infringement
Transaction Prohibited
Illumina/Grail
DIAGNOSTIC TESTING
Statement of Objections
Restorative Measures
5 December 2022
Acquisition of Pfleiderer Polska by Kronospan
WOOD-BASED PANELS
Opening of Phase 2 investigation on 5 April 2022
Withdrawal of notification on 29 November 2022
29 November 2022
ALD acquires Leaseplan
OPERATIONAL CAR LEASING
Phase 1 Commitments Decision
Divestment: ALD Leasing businesses in IE, NO, PT
Leaseplan businesses in CZ, FI, LU
Provide Transition Services
25 November 2022

ANNEX III: Form for formal complaint in antitrust proceedings ("Form C")

FORM C

COMPLAINT PURSUANT TO ARTICLE 7 OF REGULATION (EC) No 1/2003

I. Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e-mail-address) from which supplementary explanations can be obtained.

2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant vis-à-vis the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

II. Details of the alleged infringement and evidence

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Article 81 or 82 of the Treaty and/or Article 53 or 54 of the EEA agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.

4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations…). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers etc.).

5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between Member States or between the Community and one or more EFTA States that are contracting parties of the EEA Agreement may be affected by the conduct complained of.

III. Finding sought from the Commission and legitimate interest

6. Explain what finding or action you are seeking as a result of proceedings brought by the Commission.

7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Regulation (EC) No 1/2003. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the Commission would be liable to remedy the alleged grievance.

IV. Proceedings before national competition authorities or national courts

8. Provide full information about whether you have approached, concerning the same or closely related subject-matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

Date and signature.

ANNEX IV:
Form for the submission of complaints concerning alleged unlawful state aid or misuse of aid

FORM FOR THE SUBMISSION OF COMPLAINTS CONCERNING ALLEGED UNLAWFUL STATE AID OR MISUSE OF AID
The mandatory fields are marked with a star (*).

1. Information regarding the complainant

First Name:*

Surname:*

Address line 1:*

Address line 2:

Town/City:*

County/State/Province:

Postcode:*

Country:*

Telephone:

Mobile Telephone:

E-mail address:*

Fax:

2. I am submitting the complaint on behalf of somebody (a person or a firm)

Yes* No*

If yes, please also provide the following information

Name of the person/firm you represent*:

Registration nr. of the entity:

Address line 1:*

Address line 2:

Town/City:*

County/State/Province:

Postcode:*

Country:*

Telephone 1:

Telephone 2:

E-mail address:*

Fax:

Please attach proof that the representative is authorized to act on behalf of this person/firm.*

3. Please select one of the following options, describing your identity*

a) Competitor of the beneficiary or beneficiaries
b) Trade association representing the interests of competitors
c) Non-governmental organisation
d) Trade union
e) EU citizen
f) Other, please specify

....

Please explain why and to what extent the alleged State aid affects your competitive position / the competitive position of the person/firm you represent. Provide as much concrete evidence as possible.

Please be aware that, by virtue of Article 20(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, only interested parties within the meaning of Article 1(h) of that Regulation may submit formal complaints. Therefore, in the absence of a demonstration that you are an interested party, the present form will not be registered as a complaint, and the information provided therein will be kept as general market information.

....

....

4. Please select one of the following two options*

☐ Yes, you may reveal my identity

☐ No, you may not reveal my identity

If not, please specify the reasons:

....

....

Confidentiality: If you do not wish your identity or certain documents or information to be disclosed, please indicate this clearly, identify the confidential parts of any documents and give your reasons. In the absence of any indication about confidentiality of your identity or certain documents or information, those elements will be treated as non-confidential and may be shared with the Member State allegedly granting the State aid. The information contained in points 5 and 6 cannot be designated as confidential.

5. Information regarding the Member State granting the aid*

Please be aware: the information provided under this point is regarded as non-confidential.

a) Country:
b) If known, specify which institution or body granted the alleged unlawful State aid:
Central government:
Region (please specify):
Other (please specify):

6. Information regarding the alleged aid measure*

Please be aware: the information provided under this point is regarded as non-confidential.

a) Please provide a description of the alleged aid, and indicate in what form it was granted (loans, grants, guarantees, tax incentives or exemptions etc.).

....

b) For what purpose was the alleged aid given (if known)?

....

....

c) What is the amount of the alleged aid (if known)? If you do not have the exact figure, please provide an estimate and as much justifying evidence as possible.

....

d) Who is the beneficiary? Please give as much information as possible, including a description of the main activities of the beneficiary/firm(s) concerned.

....

....

e) To your knowledge, when was the alleged aid granted?

....

f) Please select one of the following options:

☐ According to my knowledge, the State aid was not notified to the Commission.

☐ According to my knowledge, the State aid was notified, but it was granted before the decision of the Commission. If known, please indicate the notification reference number or indicate when the aid was notified.

....

☐ According to my knowledge, the State aid was notified and approved by the Commission, but its implementation did not respect the applicable conditions. If known, please indicate the notification reference number or indicate when the aid was notified and approved.

....

☐ According to my knowledge, the State aid was granted under a block exemption regulation, but its implementation did not respect the applicable conditions.

7. Grounds of complaint*

Please note that, for a measure to qualify as State aid under Article 107(1) TFEU, the alleged aid has to be granted by a Member State or through State resources, it has to distort or threaten to distort competition by favouring certain undertakings or the production of certain goods, and affect trade between Member States.

a) Please explain to what extent public resources are involved (if known) and, if the measure was not adopted by a public authority (but for instance by a public undertaking), please explain why, in your view, it is imputable to public authorities of a Member State.

....

....

b) Please explain why, in your opinion, the alleged State aid is selective (i.e. favours certain commercial undertakings or the production of certain goods).

....

....

c) Please explain how, in your opinion, the alleged State aid provides an economic advantage for the beneficiary or beneficiaries.

....

....

d) Please explain why, in your view, the alleged State aid distorts or threatens to distort competition.

....

....

e) Please explain why, in your view, the alleged aid affects trade between Member States.

....

....

8. Compatibility of the aid

Please indicate the reasons why in your view the alleged aid is not compatible with the internal market.

....

....

9. Information on alleged infringement of other rules of European Union law and on other procedures

a) If known, please indicate what other rules of European Union law you think have been infringed by the granting of the alleged aid. Please be aware that this does not imply necessarily that those potential infringements will be dealt with within the State aid investigation.

....

....

b) Have you already approached the Commission's services or any other European institution concerning the same issue? *

Yes No

If yes, please attach copies of correspondence.

c) Have you already approached national authorities or national courts concerning the same issue? *

Yes No

If yes, please indicate which authorities or courts; also, if there has already been a decision or judgement, please attach a copy (if available); if, on the contrary, the case is still pending, please indicate its reference (if available).

....

....

d) Please provide any other information that may be relevant for the assessment of this case.

....

....

10. Supporting documents

Please list any documents and evidence which are submitted in support of the complaint and add annexes if necessary

- Whenever possible, a copy of the national law or other measure which provides the legal basis for the payment of the alleged aid should be provided.
- Whenever possible, please attach any available evidence that the State aid was granted (e.g. press release, published accounts).
- If the complaint is submitted on behalf of someone else (a natural person or a firm) please attach proof that you as a representative are authorised to act.
- Where applicable, please attach copies of all previous correspondence with the European Commission or any other European or national institution concerning the same issue.
- If the issue has already been dealt with by a national court/authority, please attach a copy of the judgement/decision, if available.

....

....

I hereby declare that all the information in this form and annexes is provided in good faith.

Place, date and signature of complainant

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